

# TRANSCRIPT OF RECORD

---

---

Supreme Court of the United States

OCTOBER TERM, 1961

No. 141

---

STATE BOARD OF INSURANCE, ET AL.,  
PETITIONERS,

*vs.*

TODD SHIPYARDS CORPORATION,

---

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE  
STATE OF TEXAS, THIRD SUPREME JUDICIAL DISTRICT

---

---

PETITION FOR CERTIORARI FILED JUNE 10, 1961

CERTIORARI GRANTED OCTOBER 9, 1961

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 144

STATE BOARD OF INSURANCE, ET AL.,  
PETITIONERS,

*vs.*

TODD SHIPYARDS CORPORATION.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE  
STATE OF TEXAS, THIRD SUPREME JUDICIAL DISTRICT

## INDEX

	Original	Print
Record from the District Court of Travis County, Texas, 53 Judicial District		
Defendant's first original answer	1	1
Plaintiff's eighth amended original petition	5	3
Exhibit "B"—Insurance coverage by Todd Shipyards Corporation of real and personal property	10	11
Exhibit "A"—Payments made by Todd Ship- yards Corporation for tax, penalty and in- terest on insurance premiums	12	13
Statement of facts	30	26
Appearances	30	26
Testimony of Mrs. Gardner— direct	32	28
Frank Swartz— direct	36	30
Penn J. Jackson— direct	42	34



	Original	Print
Record from the District Court of Travis County, Texas, 53 Judicial District—Continued		
Statement of facts—Continued		
Testimony of William A. Harrison—		
direct .....	45	36
C. O. Boone—		
direct .....	48	38
cross .....	54	42
redirect .....	55	42
Reporter's certificate (omitted in printing) ..	57	43
Plaintiff's Exhibit No. 1—Stipulation of facts	61	44
Exhibit "A"—List of Todd insurance agree- ments covering Texas risk, dates of cover- age and premium paid .....	71	51
Exhibit "B"—Copies of insurance policies between Todd Shipyards Corporation and Lloyds of London and Institute of London Underwriters .....	72	53
Exhibit "C"—Survey of loss prepared by Salvage Association, London .....	155	134
Plaintiff's Exhibit No. 2—Supplemental stipu- lation .....	158	137
Plaintiff's Exhibit No. 3—Supplemental stipu- lation No. 2 .....	161	139
Plaintiff's Exhibit No. 4—Excerpt from Eighty- Fourth Annual Report of the State Board of Insurance .....	166	148
Plaintiff's Exhibit No. 6—Itemized list of oc- cupation taxes collected by the Insurance Commission in the '57-58 year .....	168	150
Plaintiff's Exhibit No. 7—Excerpt from 1959 Annual Report of the Comptroller of Public Accounts of the State of Texas—Table No. 103—Omnibus tax clearance fund No. 120 for the year ending August 31, 1959 .....	169	151
Deposition of Edward W. Costello .....	173	156
Judgment .....	214	178
Motion to send up original exhibits and papers	219	181
Order to send up original exhibits .....	219	181
Clerk's certificate (omitted in printing) .....	225	182

# INDEX

iii

	Original	Print
Record from the Court of Civil Appeals, Third		
Supreme Judicial District	226	182
Judgment and order	226	182
Opinion, Hughes, J.	227	183
Appellants' motion for rehearing	237	191
Order overruling appellant's motion for rehearing	240	193
Proceedings in the Supreme Court of Texas	247	193
Application for writ of error	247	193
Instrument to clarify the identity of petitioners	274	213
Answer to application for writ of error and respondent's brief	285	214
Judgment	320	241
Per curiam opinion	321	242
Petitioners' motion for rehearing	324	243
Order overruling motion for rehearing	327	245
Order allowing certiorari	328	245

[fol. 1]

**IN THE  
DISTRICT COURT OF TRAVIS COUNTY, TEXAS  
53RD JUDICIAL DISTRICT**

No. 112,081

TODD SHIPYARDS CORPORATION,

v.

BOARD OF INSURANCE COMMISSIONERS, et al.

DEFENDANT'S FIRST ORIGINAL ANSWER  
—Filed December 1, 1958—

*To the Honorable Judge of Said Court:*

Comes Now Penn J. Jackson, Robert W. Strain, and David B. Irons, members of the State Board of Insurance, William A. Harrison, Commissioner of Insurance, Will Wilson, Attorney General of the State of Texas, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, and Jesse James, Treasurer of the State of Texas, hereinafter styled defendants and in reply to Plaintiff's pleadings herein would show to the Court as follows:

*Pleas in Abatement*

I.

Defendants say that the plaintiff is not entitled to recover in any capacity from the "Board of Insurance Commissioners" or from any of said defendants as members of such "Board of Insurance Commissioners". Defendants do not know of the existence of any such entity as the "Board of Insurance Commissioners" and none of them are or ever have been members of the "Board of Insurance Commissioners". Defendants further state that the "Board of Insurance Commissioners" was abolished by the enact-

ment of Senate Bill 222, Acts 55th Legislature, R.S. 1957, p. 1454, ch. 499 and that such "Board of Insurance Commissioners" no longer exists. To this extent, therefore, this suit should be abated.

## II.

Plaintiff is not entitled to recover against Penn J. Jackson, Robert W. Strain, or David B. Irons, or any of them in any of their respective individual capacities for the reason that there are no allegations set forth in the Plaintiff's Petition showing any breach of duty or act of omission on the part of any said defendants upon which plaintiff could predicate a cause of action. All of the actions objected to and complained of in the Plaintiff's Original Petition, if true, the defendants specifically deny, would be actions done upon the part of these defendants in their respective official capacities as members of the State [fol. 2] Board of Insurance. Accordingly, this plaintiff is not entitled to recover against any of the named individuals in their respective individual capacities and this suit should therefore be abated.

Wherefore, Premises Considered, Defendants pray their pleas in abatement be sustained.

### *Original Answer*

Defendants deny all and several, each and every allegation in Plaintiff's Petition contained and demands strict proof thereof upon trial hereof and of this they place themselves upon the country.

Wherefore, Premises Considered, Defendants pray that plaintiff take nothing by its suit, and that defendants go hence with their costs and without day.

Respectfully submitted,

Will Wilson, Attorney General of Texas, Fred B. Werkenthin, Assistant Attorney General, Wallace P. Finrock, Assistant Attorney General.

In answer to the plaintiff's 8th amended petition, we adopt all of the allegations of the answer and also answer for the defendant G. B. Gibbs.

Bob Eric Shannon, Assistant Atty. General.

*Duly sworn to by Wallace P. Finfrock, jurat omitted in printing.*

[fol. 3] [File endorsement omitted]

[fol. 5]

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS  
53RD JUDICIAL DISTRICT  
No. 112,081

TODD SHIPYARDS CORPORATION,

vs.

STATE BOARD OF INSURANCE, Formerly Board of  
INSURANCE COMMISSIONERS, et al.

PLAINTIFF'S EIGHTH AMENDED ORIGINAL PETITION  
—Filed February 1, 1960

To Said Honorable Court:

Now Comes Todd Shipyards Corporation, a corporation duly created and existing under and by virtue of the laws of the State of New York and duly authorized by appropriate permit to solicit and transact business in the State of Texas, hereinafter called "Plaintiff", and, with leave of court first obtained, files this its Eighth Amended Original Petition. Todd Shipyards Corporation hereby complain of the State Board of Insurance and the Board of Insurance Commissioners, duly created and existing under and by virtue of the laws of the State of Texas, Penn J. Jackson, individually and as a member of the Board of Insur-

ance Commissioners and as a member of the State Board of Insurance, Robert W. Strain, individually and as a member of the Board of Insurance Commissioners and as a member of the State Board of Insurance, J. P. Gibbs, individually and as a member of the State Board of Insurance, William A. Harrison, Commissioner of Insurance, Will Wilson, Attorney General of the State of Texas, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, and Jesse James, Treasurer of the State of Texas, hereinafter called "Defendants", and for cause of action would respectfully show the Court as follows:

# I.

That the 55th Legislature of the State of Texas enacted the following statute, appearing as Article 2138 of the Texas Insurance Code, which provides, among other things, as follows:

## Taxed

[fol. 6] "Section 2 (e) If any person, firm, association or corporation shall purchase from an insurer not licensed in the State of Texas a policy of insurance covering risks within this State in a manner other than through an insurance agent licensed as such under the laws of the State of Texas, such person, firm, association or corporation shall pay to the Board a tax of five per cent (5%) of the amount of the gross premiums paid by such insured for such insurance. Such tax shall be paid not later than thirty (30) days from the date on which such premium is paid to the unlicensed insurer."

“(g) Any person, firm, association or corporation, or any receiver of such, failing to pay any tax for a period of thirty (30) days from the date when said tax is required by the foregoing Subdivision (d) or Subdivision (e), (whichever is applicable), shall forfeit and pay to the State of Texas a penalty of twenty-five per cent (25%) upon the amount of such tax and in which event the Board of Insurance Commissioners shall report the default to the Attorney General of Texas who shall prosecute a suit for and be entitled

to recovery of the amount of such tax and the amount of such additional penalty, which amount of such tax and penalty shall draw interest at the rate of six per cent (6%) per annum from the date such penalty accrues until fully paid."

## II.

That under the duress of this unconstitutional statute, Todd Shipyards Corporation, during the period from September 22, 1958, through January 22, 1960, paid to the State Board of Insurance of the State of Texas, or its predecessor, the Board of Insurance Commissioners of the State of Texas, the taxes, penalties and interest attempted to be levied and assessed upon the New York contract, the New York transaction and the payment of premiums in New York City under this unlawful statute. The total of such taxes, penalties and interest so paid is \$20,605.53, and such \$20,605.53 was paid in the indicated amounts and on or about the dates following:

September 22, 1958 .....	\$11,882.32
October 11, 1958 .....	985.00
October 22, 1958 .....	40.54
January 23, 1959 .....	624.55
February 17, 1959 .....	25.00
April 9, 1959 .....	29.76
August 21, 1959 .....	1,660.99
September 1, 1959 .....	2,495.41
October 19, 1959 .....	1,391.70
January 19, 1960 .....	12.88
January 21, 1960 .....	1,457.38
<b>Total</b> .....	<b>\$20,605.53</b>

[fol. 7] Attached hereto as Exhibit "A" and incorporated herein is an itemized list of the foregoing payments by Todd of such taxes, penalties and interest, as well as the premiums on which such tax was levied.

## III.

That the foregoing statute, Article 21.38, Section 2 (c) of the Texas Insurance Code, and the tax attempted to be

levied thereby, is unconstitutional, void and unenforceable because:

- (1) The taxing provision of Article 21.38 et seq. of the Texas Insurance Code is unconstitutional, invalid and void under the Texas and the United States Constitution;
- (2) Such tax is invalid and void because it takes Todd Shipyards Corporation's property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 19, Article 1 of the Constitution of the State of Texas;
- (3) Such tax is invalid and void because, among other things, it deprives Plaintiff of Plaintiff's liberty to contract, which liberty is guaranteed by Section 1 of Amendment 14 of the Constitution of the United States;
- (4) Such tax is invalid and void as a violation of the rules set forth in *St. Louis Cotton Compress Co. v. The State of Arkansas*, 260 U.S. 347 (1922), because among other things, such tax interferes with activities carried on outside and beyond the jurisdiction of the State of Texas by Plaintiff, a non-resident corporation, with London insurance companies, domiciled in England, a foreign country, and New York insurance brokers domiciled in New York, New York, and the State of Texas has no jurisdiction to tax, regulate or otherwise burden Plaintiff's New York contracts, transactions and payment of premiums.
- (5) The tax levied violates Sections 1 and 2 of Article VIII of the Constitution of Texas because the tax is not equal and uniform upon members of the same class, which class is composed of persons engaging in the taxable transaction of paying premiums on insurance policies or agreements covering Texas risks, but instead arbitrarily and invidiously discriminates against Todd Shipyards



Corporation by taxing Todd at the rate of 5% of gross premiums paid, which is much more than the tax imposed for insuring in authorized companies.

- (6) Such tax denies Todd Shipyards Corporation the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment of the United States, because the tax constitutes an arbitrary, unreasonable and invidious discrimination against non-resident or unauthorized insurance companies and persons, corporations and associations paying premiums on Texas risks to unauthorized insurers, and in favor of authorized insurance companies and those paying premiums on Texas risks to authorized insurers.

[fol. 8]

- (7) Such tax is invalid and void as a violation of each of the rules set forth in *H. Ruor Co. vs. Texas Citrus Commission*, 151 Tex. 182, 247 S.W. 2d 231 (1952), because, among other things, such tax is not levied equally and uniformly upon all persons engaging in the taxable transaction of purchasing insurance or paying premiums covering Texas risks.
- (8) Such tax is invalid and void as a violation of the rules set forth in *Wheeling Steel Corporation v. Glander*, 337 U.S. 562 (1948), because, among other things, such tax constitutes an arbitrary, unreasonable and invidious discrimination against those paying premiums to non-residents of Texas or to insurance companies not authorized to do business in Texas and in favor of those paying premiums to residents of Texas or to insurance companies authorized to do business in Texas.
- (9) The tax is an unconstitutional attempt to authorize the levy and collection of an occupation tax without providing that one-fourth ( $\frac{1}{4}$ ) of the revenues therefrom shall be set apart annually for the benefit of the public free schools of Texas

as required by Article 7, Section 3 of the Texas Constitution.

#### IV.

All insurance agreements material to this suit are listed in Exhibit "B" which is attached hereto and incorporated herein. All such insurance agreements were entered into in New York City, New York, and all premiums on such policies or agreements were and are payable in New York and have in fact been paid in New York, the domicile of Plaintiff. Such policies were negotiated in New York by Plaintiff's New York agent through Canadian and New York brokers and were issued by Lloyds of London and the Institute of London Underwriters, insurers domiciled in London, England. Lloyds of London and the Institute of London Underwriters have not solicited insurance business in Texas from Plaintiff's Texas plants, and such insurers have no offices and no agents in Texas, are not admitted to do business in Texas, furnish no annual reports to the State Board of Insurance of the State of Texas, or to its predecessor, the Board of Insurance Commissioners, and are in no way subject to the jurisdiction or regulation of the State of Texas. There is no communication between Todd's Texas plants and the brokers or insurers. All negotiation, confirmation, and acceptance of insurance and reinsurance on behalf of Todd Shipyards Corporation is in New York. All claims losses are payable in New [fol.9] York and have in fact been paid in New York. Lloyds of London and the Institute of London Underwriters do not investigate Todd's loss claims in Texas. Long before this Taxing Act was passed, Todd Shipyards Corporation had made large investments in Texas in real and personal property essential to the conduct of its business, and it has insured by the types of agreements set forth on Exhibit "B" and has held and operated such property ever since.

#### V.

That each and all of the facts stipulated in the Stipulation of Facts and supplemental Stipulation of Facts filed herein is hereby adopted and plead in the alternative.


## VI.

That each of the above listed payments was duly made under protest in accordance with the Texas Protest Statute, Article 7057b, and this suit has been duly filed within 90 days of each protest payment and in accordance with the Texas Protest Statute.

Wherefore, Premises Considered, Plaintiff prays that the Defendants, and each of them, be duly cited to appear and answer herein and that upon final hearing hereof Plaintiff do have and recover of and from the Defendants, and each of them, the just sum of \$20,605.53, together with interest as provided for under the terms of the Texas Protest Statute, Article 7057b, and that the State Treasurer and Comptroller of Public Accounts be ordered and directed to comply with the terms and provisions of such Protest Statute, that Plaintiff recover all costs incurred herein, that the validity of such statute and its application to each of such premium payments be fixed, declared and established by a declaratory decree, and that Plaintiff have such other and further relief, general and special, as it may be entitled to receive, either at law or in equity.

Liddell, Austin, Dawson & Huggins, By Charles R. Vickery, Jr., By Meyer W. Witt, Attorneys for Plaintiff, 510 Gulf Building, Houston 2, Texas.

EXHIBIT "B" TO PLAINTIFF'S EIGHTH AMENDED  
ORIGINAL PETITION

(See opposite) 

[fol. 10]

**EXHIBIT "B" TO PLAINTIFF'S EIGHTH AMENDED  
ORIGINAL PETITION**

<u>Polic</u>	<u>Period</u>	<u>Risk</u>
Lloyd's London #542/H. 1. 9350) Institute of ) London Underwriters do )	6/6/56 to 6/5/57	Hull & Machinery Ins. Todd-owned Dry Docks
Lloyd's London #542/H. 1. 3193) Institute of ) London Underwriters do )	9/13/59 to 9/13/60	Hull & Machinery Ins. Leased Navy Dry Dock "AFM-1"
Lloyd's London #542/57 H46-/JX) Institute of ) London Underwriters )	5/17/57 to 5/17/60	Collision, Flood, Subsidence & Collapse Ins. - Piers, Bulk- heads and Launching ways
*Pro Forma of Lloyd's London and Institute of London Underwriters #576/87514	9/1/58 to 9/1/59	Industrial Work Property Damage Insurance
Lloyd's London #542/59/137084 Institute of ) London Underwriters do )	5/1/59 to 5/1/60	Products Liability Ins.-First Excess Cover
Lloyd's London #542/59/137084 Institute of ) London Underwriters do )	5/1/59 to 5/1/60	Products Liability Ins.-Second Excess Cover
Lloyd's London #576/89399) Institute of ) London Underwriters do )	Repair period	Builders Risk Ins. covering S/S "ATZCAPOTZALCO" while undergoing repairs
Lloyd's London #576/86411) Institute of ) London Underwriters do )	Repair period	Builders Risk Inc. covering S/S "VANA CRUL" while under- going repairs
Lloyd's London #576/86410) Institute of ) London Underwriters do )	Repair period	Builders Risk Inc. covering S/S "POINARO DEL MARCO 11" while undergoing repairs
Lloyd's London #576/91100) Institute of ) London Underwriters do )	Repair period	Builders Risk Ins. covering S/S. "AZTECA" during repair period
Pro Forma of Lloyd's London and Institute of London Underwriters #576/87974 )	Repair period	Builders Risk Ins. covering S/S "GENERAL LALARO CARRERAS" while undergoing repairs
Pro Forma of Lloyd's London and Institute of London Underwriters #576/90158 )	Construction period	Builders Risk Inc. covering Hull No. 179 during con- struction
Lloyd's London #576/89311 ) Institute of ) London Underwriters do )	Construction period	Builders Risk Inc. covering Hull No. 180 during construc- tion
Lloyd's London #576/86390) Institute of ) London Underwriters do )	Construction period	Builders Risk Ins. covering Hulls Nos. 181 and 182 during construction

[fol. 11]

Pro Forma of Lloyd's London and Institute of London Underwriters #573/3055	Construction period	Builders Risk Ins. covers Hull No. 183 during con- struction
Pro Forma of Lloyd's London and Institute of London Underwriters #575/88884)	Construction period	Builders Risk Ins. covers Hull No. 184 during con- struction
Lloyd's London #575/87389) Institute of #575/87902) London Underwriters do )	Construction period	Builders Risk Ins. covers Hulls Nos. 185 to 187 dur- ing construction
Pro Forma of Lloyd's London and Institute of London Underwriters #576/88335	Construction period	Builders Risk Ins. covers Hulls Nos. 202 and 203 during construction
Lloyd's London #576/87740) Institute of ) London Underwriters do )	Construction period	Builders Risk Ins. covers Hull No. 204 during con- struction
Pro Forma of Lloyd's London and Institute of London Underwriters #576/11301	Construction period	Builders Risk Ins. covers Hulls Nos. 205, 207 and during construction
Lloyd's London #576/12557) Institute of ) London Underwriters do )	Construction period	Builders Risk Ins. covers Hull No. 208 during con- struction
Lloyd's London #576/88180) Institute of ) London Underwriters do )	Construction period	Builders Risk Ins. covers Hull No. 213 during con- struction
Pro Forma of Lloyd's London and Institute of London Underwriters #576/88503	Construction period	Builders Risk Ins. covers Hull No. 214 during con- struction
Pro Forma of Lloyd's London and Institute of London Underwriters #576/12550	Construction period	Builders Risk Ins. covers Hulls Nos. 215 and 217 during construction
Lloyd's London #576/1111 ) Institute of ) London Underwriters )	Repair Period	Builders Risk Ins. covers Hull No. 216 during repair carried out after construc- tion and delivery had been completed
Lloyd's London #576/91260) Institute of ) London Underwriters do )	Construction Period	Builders Risk Ins. covers Hulls Nos. 232 and 233 during construction
Lloyd's London #576/12511) Institute of ) London Underwriters do )	Construction period	Builders Risk Ins. covers Hull No. 240 during construction

\* Policies for later year or years not available, having been sent to underwriters in connection with collection of losses.

EXHIBIT "A" TO PLAINTIFF'S EIGHTH AMENDED  
ORIGINAL PETITION

[fol. 12]

<u>TYPE OF INSURANCE</u>	<u>DATE PAID</u>	<u>PREMIUM INVOLVED</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
Dry Dock Insurance	7-3-57	28,430.25	1421.51	355.38	110.99	1887.88
	7-3-58	28,430.25	1421.51	355.38	4.38	1781.27
Piers & Bulkhead Coll.	7-19-57	4,000.00	200.00	50.00	14.96	264.96
	9-4-57	3,375.36	168.77	42.19	10.99	221.95
	7-9-58	8,000.00	400.00	100.00	.74	500.74
Industrial Work- Property Damage	12-2-57	199.18	9.96	2.49	.47	12.92
	3-19-58	2,515.78	125.79	31.45	3.13	160.37
Builders Risk Insurance	8-5-57	870.53	43.53	10.88	2.83	57.24
	2-11-58	211.15	10.56	2.64	.34	13.54
Excess Prod. Liability	2-7-58	104.50	5.23	1.31	.17	6.71
			<u>3806.56</u>	<u>951.72</u>	<u>149.00</u>	<u>4907.58</u>

TODD SHIPYARDS CORPORATION  
(GALVESTON DIVISION)  
SCHEDULE OF TAX, PENALTY AND INTEREST  
ENGLISH UNDERWRITERS  
SEPTEMBER 16, 1958

Type of Insurance	Date Paid	Premiums Involved	Tax	Penalty	Interest	Total
Dry Dock Ins.(Incl.Strikes etc.) D.D.#1 & #2	7/24/57	\$ 32,800.94	\$1,640.00	\$ 410.00	\$ 120.98	\$ 2,170.98
Dry Dock Ins.(Incl.Strikes etc.) D.D.#1 & #2	7/ 3/58	32,800.94	1,640.00	410.00	5.05	2,055.05
Dry Dock Ins.(Incl.Strikes etc.) AFDM-1	9/18/57	19,500.47	975.00	243.75	60.70	1,279.45
Plant and/or Piers - Collision, etc.	6/28/57	9,900.00	495.00	123.75	39.16	657.91
- Reinstatement of Loss						
5/20/57	6/27/58	76.63	3.82	.96	.02	4.80
- Reinstatement of Loss						
9/20/57	7/11/58	5.43	.26	.07	-	.33
Plant and/or Piers - Collision, etc.	7/11/58	10,968.75	548.44	137.11	.79	686.34
Plant and/or Piers - Reinstatement of Loss						
1/16/57	4/ 4/58	12.63	.52	.15	.01	.79
- Reinstatement of Loss						
11/2/55	4/ 4/58	53.79	2.68	.67	.06	3.41
Industrial Work Property Damage	12/ 2/57	9.32	.47	.12	.02	.61
Industrial Work Property Damage	3/19/58	100.00	5.00	1.25	.12	6.37
Products Liability - Bodily Injury & Property Damage	1/31/58	187.58	9.38	2.35	.32	12.05
Hull & Machinery Inc. P & I Port Risk - Potrero del Llano	10/ 4/57	322.74	16.13	4.03	.95	21.11
Hull & Machinery Inc. P & I Port Risk - Vera Cruz	10/ 4/57	242.10	12.10	3.03	.72	15.85
Hull etc. Port-Repair - General Lazero Cardenas	4/18/58	906.25	45.31	11.33	.85	57.49
Hull ect. Port-Repair - General Lazero Cardenas	6/27/58	35.00	1.75	.44	.01	2.20
		<u>\$107,222.57</u> *	<u>\$5,325.25</u>	<u>\$1,349.02</u>	<u>\$ 222.76</u>	<u>\$ 6,974.74</u>

\* Premiums Involved total include British Stamp Tax Paid.



TODD SHIPYARDS CORPORATION  
(GALVESTON DIVISION)  
SCHEDULE OF TAX, PENALTY AND INTEREST  
ENGLISH UNDERWRITERS  
OCTOBER 1, 1958

<u>Type of Insurance</u>	<u>Date Paid</u>	<u>Premiums Involved</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
Dry Dock Ins. (Incl. Strikes, etc.) AFDM-1	9-29-58	\$19,500.47	\$975.00	0.00	0.00	\$975.00
Hull & Machinery Ins. P & I Port/Builders Risk - Atzcapotzalco	9-26-58	200.00	10.00	0.00	0.00	10.00
		<u>\$19,700.47*</u>	<u>\$985.00</u>	<u>0.00</u>	<u>0.00</u>	<u>\$985.00</u>

\* Premiums Involved total include British Stamp Tax Paid

TODD SHIPYARDS CORPORATION  
(PRODUCTS DIVISION)

OCTOBER 13, 1958

[fol. 15]

16

<u>TYPE OF INSURANCE</u>	<u>DATE PAID</u>	<u>PREMIUM INVOLVED</u>	<u>TAX</u>
Builder's Risk	10/14/58	\$713.36	\$35.67
Builder's Risk	10/14/58	<u>97.41</u>	<u>4.87</u>
		<u>\$810.77</u>	<u>\$40.54</u>

TODD SHIPYARDS CORPORATION  
(PRODUCTS DIVISION)

JANUARY 19, 1959

<u>Type of Insurance</u>	<u>Date Paid</u>	<u>Premium Involved</u>	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
Builder's Risk	1/19/59	\$12,491.08	\$624.55	\$0.00	\$0.00	<u>\$624.55</u>

[fol. 16]

TODD SHIPYARDS CORPORATION  
(PRODUCTS DIVISION)

FEBRUARY 12, 1959

[fol. 17]

18

<u>Type of Insurance</u>	<u>Date Paid</u>	<u>Premium Involved</u>	<u>Tax</u>	<u>Interest</u>	<u>Penalty</u>	<u>Total</u>
Industrial Work Property Damage	2/12/59	\$500.00	\$25.00	\$0.00	\$0.00	\$25.00

TODD SHIPYARDS CORPORATION  
(PRODUCTS DIVISION)

MARCH 31, 1959

<u>TYPE OF INSURANCE</u>	<u>DATE PAID</u>	<u>PREMIUM INVOLVED</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
Builder's Risk	3/31/59	\$ 86.02	\$ 4.30	\$0.00	\$0.00	\$ 4.30
"	"	<u>205.27</u>	<u>10.26</u>	0.00	0.00	<u>10.26</u>
			<u>\$14.56</u>			<u>\$14.56</u>

[fol. 18]

TODD SHIPYARDS CORPORATION  
(PRODUCTS DIVISION)

APRIL 8, 1959

<u>Type of Insurance</u>	<u>Date Paid</u>	<u>Premium Involved</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
Builder's Risk *	4/8/59	\$304.03	\$15.20	\$0.00	\$0.00	<u>\$15.20</u>

TODD SHIPYARDS CORPORATION  
(GALVESTON DIVISION)  
SCHEDULE OF TAX, PENALTY AND INTEREST  
ENGLISH UNDERWRITERS  
AUGUST 20, 1959

<u>Type of Insurance</u>	<u>Date Paid</u>	<u>Premium Involved</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
Industrial Work Property Damage	5-31-59	\$ 10.69	\$ .53	\$ .13	\$ -	\$ .66
Hull & Machinery Incl. P & I Port/Builders Risk - Azteca	5-1-59	322.58	16.13	4.03	.17	20.33
Dry Dock Ins. (Incl. Strikes, etc.) D.D. #1 & #2	7-10-59	<u>32,800.94</u>	<u>1,640.00</u>	<u>-</u>	<u>-</u>	<u>1,640.00</u>
		<u>\$33,134.21</u>	<u>\$1,656.66</u>	<u>\$4.16</u>	<u>\$ .17</u>	<u>\$1,660.99</u>

[fol. 20]

TODD SHIPYARDS CORPORATION  
(PRODUCTS DIVISION)

AUGUST 31, 1959

[fol. 21]

<u>TYPE OF INSURANCE</u>	<u>DATE PAID</u>	<u>PREMIUM INVOLVED</u>	<u>TAX</u>	<u>PENALTY</u>	<u>INTEREST</u>	<u>TOTAL</u>
Dry Dock	7/9/59	\$26,251.46	\$1,312.57	.00	.00	\$1,312.57
"	"	2,180.92	109.05	.00	.00	109.05
Piers & Bulkhead Collision	8/27/59	7,500.00	375.00	.00	.00	375.00
Builders Risk	7/13/59	62.29	3.11	.00	.00	3.11
Pre-Keel	"	860.13	43.01	.00	.00	43.01
Delivery Trip	"	4,248.98	212.45	.00	.00	212.45
Builders Risk	8/24/59	3,660.49	183.02	.00	.00	183.02
"	7/16/59	385.56	19.28	.00	.00	19.28
"	"	2,535.91	126.80	.00	.00	126.80
"	"	1,595.20	79.76	.00	.00	79.76
"	"	13.35	.67	.00	.00	.67
"	7/13/59	613.84	30.69	.00	.00	30.69
		<u>\$49,908.13</u>	<u>\$2,495.41</u>	<u>.00</u>	<u>.00</u>	<u>\$2,495.41</u>



TODD SHIPYARDS CORPORATION  
(GALVESTON DIVISION)

OCTOBER 19, 1959

<u>Type of Insurance</u>	<u>Date Paid</u>	<u>Premium Involved</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
Pier & Bulkhead Collision, Flood, Subsidence and Collapse	8/31/59	9,084.00	454.20	.00	.00	454.20
Hull, etc. (incl. S.R. & C.C.) Marine 3 Section Dry Dock AFD-1)	9/30/59	<u>18,750.00</u>	<u>937.50</u>	<u>.00</u>	<u>.00</u>	<u>937.50</u>
		<u>\$27,834.00</u>	<u>\$1,391.70</u>	<u>.00</u>	<u>.00</u>	<u>\$1,391.70</u>

[fol. 22]

Todd Shipyards Corporation  
 (Galveston Division)  
 Schedule of Tax, Penalty and Interest  
 English Underwriters  
 December 17, 1959

[fol. 23]

24

<u>Type of Insurance</u>	<u>Date Paid</u>	<u>Premium Involved</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
Industrial Work Property Damage	11-3-58	100.00	5.00	1.25	.38	6.63
do	12- -59	125.00	<u>6.25</u>	<u>-</u>	<u>-</u>	<u>6.25</u>
			<u>\$11.25</u>	<u>\$1.25</u>	<u>\$ .38</u>	<u>\$12.88</u>

TODD SHIPYARDS CORPORATION  
(PRODUCTS DIVISION)

JANUARY 20, 1960

[fol. 24]

<u>TYPE OF INSURANCE</u>	<u>DATE PAID</u>	<u>PREMIUM INVOLVED</u>	<u>TAX</u>
Builders Risk - Hull No. 179	12/23/59	\$ 979.58	\$ 48.98
" " " " 183	"	1,468.92	73.45
" " " " 244	"	8,753.38	437.67
" " " " 183	"	13,530.00	676.50
" " " 206-7-8	12/10/59	341.07	17.05
" " " 218-37	"	462.93	23.14
" " " "	"	945.16	47.26
" " " 244	"	943.44	47.17
" " " 238-9	"	1,723.21	86.16
		<u>\$29,147.69</u>	<u>\$1,457.38</u>

[fol. 25]

[File endorsement omitted]

[fol. 30]

No. 112,081

IN THE 53RD JUDICIAL DISTRICT COURT OF  
TRAVIS COUNTY, TEXAS

January Term, A. D. 1960

TODD SHIPYARDS CORPORATION,

vs.

BOARD OF INSURANCE COMMISSIONERS, et al.

**Statement of Facts**

Before Hon. J. Harris Gardner, Judge of said Court.

**APPEARANCES:**

Charles R. Vickery, Jr., and Meyer W. Witt, both of the firm of Liddell, Austin, Dawson & Huggins, Houston, Texas; Attorneys for Plaintiff.

Hon. Bob Eric Shannon, and Hon. Fred Werkenthin, Assistant Attorneys General of the State of Texas; Attorneys for Defendants.

Be It Remembered that on the 2nd day of February, 1960, the same being one of the regular days of the January, 1960, Term of the 53rd Judicial District Court of Travis County, Texas, came on to be heard the above entitled and numbered cause, whereupon the following proceedings were had:

[fol. 31]

Tuesday, February 2, 1960

Morning Session—9:00 A. M.

Plaintiff's Direct Evidence

---

The Court: All right; you may go ahead.

Mr. Vickery: Mrs. Gardner, please.

---

MRS. VIRGINIA GARDNER, called as a witness by plaintiff, being duly sworn by the Clerk, testified as follows:

Mr. Vickery: Would you mark this Plaintiff's Exhibit 1, Plaintiff's Exhibit 2, and Plaintiff's Exhibit 3. Your Honor, the Stipulation has been marked Plaintiff's Exhibits 1, 2 and 3, which we offer in evidence.

(Thereupon the Stipulations referred to were marked for identification and received in evidence as Plaintiff's Exhibits Nos. 1, 2 and 3, and same accompany this Statement of Facts as original exhibits, by agreement of counsel and order of the Court.)

Mr. Vickery: Your Honor, we had the original stipulation, and then the lawyers had some afterthoughts, and we got some supplemental stipulations, so they are marked 2 and 3. I will read Plaintiff's Exhibit No. 1.

[fol. 32] (Reading exhibit to the Court.)

Mr. Vickery: Your Honor, we would like to introduce in its entirety the deposition of Mr. Costello, taken in New York City on November 12, 1959, by Mr. Shannon, the Attorney General, and Todd's New York counsel. There is nothing really in here that is not covered by the stipulation, and if it is all right with the Court, we won't read it; we will just introduce it and let the record show its introduction. We offer it.

The Court: All right.

(Thereupon the deposition referred to was received in evidence as a part of the record, and said deposition accompanies this Statement of Facts under separate cover by agreement of counsel and order of the Court.)

## Direct examination.

## Questions by Mr. Vickery:

Q. Mrs. Gardner, I am sorry we took all that time. Would you state your name, please, ma'am?

A. Virginia Gardner.

Q. Mrs. Gardner, do you live here in Austin?

A. Yes, I do.

Q. And what position do you hold?

[fol. 33] A. I am tax analyst for the State Board of Insurance.

Q. And how long have you held that position for the State Board of Insurance?

A. Well, about seven or eight years I have been checking taxes.

Q. What are your duties in that position?

A. I check and clear all the taxes that are paid by the licensed insurance companies and by individuals seeking excess insurance under 21.38, Section (e).

Q. I understand that under Texas Insurance Code, Article 21.38, Section 2, Subsection (e)—

A. Yes.

Q. —you handle—do you handle those collections under that statute?

A. Yes, I do.

Q. Who transmits the moneys collected to the Comptroller?

A. Well, Mr. Swartz's division, the Comptroller of the Board.

Q. Do you fill out the forms that are forwarded?

A. Yes, I do.

Q. Do you have some of those forms with you?

A. No, sir, I am sorry, I do not.

Q. On those forms that you send to the Comptroller, what classification do you put on this tax under 21.38(2)(e)?

A. Well, if it is just filled out that it is the gross premiums tax, and then on this receipt we have two sections; on this receipt we clear it to this Fund 120. This [fol. 34] is the receipt for the money that comes in.

Q. You classify it as 155 or 133?

A. Just a minute; let me see what you are talking about. This is Fund 120, and it is 155 now. This account number has been changed. It was 133, and it is now 155.

Q. Do you transmit to the Comptroller the taxes collected under Section 2(e) of Article 21.38, under Account No. 133?

A. Well, it is now 155.

Q. All right. Did you—when was it changed from 133 to 155?

A. I would say probably September 1st, about that time, of this past year, 1959. Up until then it was 133.

Q. From June of 1957 until September of '59, did you transmit your collections under this Article, Subsection 2(e) of Article 21.38, under the Account No. 133?

A. Yes—I did.

Q. And since September 1st, 1955 (1959) have you transmitted those same payments to the Comptroller under the Account No. 155?

A. I have. I am not sure of the date.

Q. Well, you have either done it under one or the other numbers?

A. Yes, 133 or 155.

Q. And have you designated those collections under this statute, Subsection 2(e), Article 21.38, for Fund 120?

[fol. 35] A. I have.

Q. Now, have you ever forwarded any collection under this Statute 21.38(2)(e) to any other fund?

A. No, sir.

Q. Have you ever sent it to the Comptroller under any other classification other than 133 or 155?

A. No, sir.

Q. And you have done that uniformly since the beginning of the tax?

A. Yes, sir.

Q. Do you recall that tax was first collected by your Department in the year '57?

A. It was about September of 1957.

Q. Has anybody in the Board of Insurance ever asked you to change the account number or the fund number to which you send those funds?

A. No, sir.

Q. Has Mr. Swartz known how you were classifying them?

A. Yes, sir.

Q. Has Mr. Jackson and the members of the Board of Insurance?

A. I do not know, sir. I haven't discussed it with him.

Mr. Vickery: No further questions.

Mr. Shannon: I have no questions.

(Witness excused.)

[fol. 36] FRANK SWARTZ, called as a witness by plaintiff, being duly sworn by the Clerk, testified as follows:

Direct examination.

Questions by Mr. Vickery:

Q. Would you state your name, please, sir?

A. Frank Swartz.

Q. Mr. Swartz, do you hold a position—how do you spell Swartz?

A. S-w-a-r-t-z.

Q. Do you hold a position with the State Board of Insurance, sir?

A. Yes, sir.

Q. And what is that position?

A. Comptroller.

Q. And how long have you been the Comptroller of the—is that comptroller, c-o-m-p, or controller, c-o-n?

A. Comptroller, c-o-m-p.

Q. How long have you held the position of Comptroller of the State Board of Insurance?

A. Well, I don't know how long that has been in, but it has been a good many years. I have been an accountant there since 1939.

Q. And have you been Comptroller at all times since June 1, '57?

A. Yes, sir.

[fol. 37] Q. Did you bring with you this morning the Eighty-Fourth Annual Report of the State Board of Insurance?

A. Yes, sir.



Mr. Vickery: Could we mark that, please, as Plaintiff's Exhibit No. 4?

(Thereupon the document referred to was marked for identification as Plaintiff's Exhibit No. 4.)

Q. Mr. Swartz, would you mind turning to page 59 of Plaintiff's Exhibit 4?

A. 69 or 59?

Q. 59; excuse me.

A. Yes.

Q. Do you have page 59?

A. Yes, sir.

Q. Page 59 is a Statement of Revenues Collected During the Year 1958-59 by the State Board of Insurance, is it not?

A. Yes, sir.

Q. Your insurance—Board of Insurance years begin and end on August 31st, do they not?

A. Yes, sir.

Q. Now, in the first column there you have Taxes Collected, do you not?

A. Yes, sir.

Q. And in the first entry on there is "Company Occupation Taxes"?

[fol. 38] A. Yes, sir.

Q. And that was cleared to the Omnibus Fund 120?

A. Yes, sir.

Q. And that figure was twenty-eight million, five hundred twelve thousand, and some odd dollars?

A. Yes, sir.

Q. Now, I will ask you if those occupation taxes that you report on page 59 are not itemized in detail on page 68 of that report, Plaintiff's Exhibit 4?

A. 58?

Q. 68; excuse me.

A. Yes, sir.

Q. Is one of the lists of those occupation taxes that you have itemized on page 68, "Insurance Purchased from Unauthorized Insurers"?

A. Yes, sir.

Q. And that is the last one on the list on page 68?

A. Well, the last tax, yes, sir. The other is retaliatory fees, yes.

Q. Now, this Insurance Purchased from Unauthorized Insurers on page 68 is the one that Mrs. Gardner was testifying about, Subsection 2(e) of Article 21.38, is it not?

A. Yes, sir.

Q. I beg your pardon?

A. Yes, sir.

Q. And you in your annual report have always reported [fol. 39] it as occupation tax, have you not?

A. Yes, sir.

Q. And you did that here in August of 1959, did you not?

A. Yes, sir.

Q. And you are still doing it today, are you not?

A. Yes, sir.

Q. Now, do you have your report for—we are going to put this in the court record if you don't mind.

A. Yes. Which one now?

Q. May we have this one for the court record?

A. Yes, sir.

Q. The Eighty-Third Annual Report.

A. Yes, sir.

Mr. Vickery: Will you mark this, please, as Plaintiff's Exhibit No. 5?

(Thereupon the document referred to was marked for identification as Plaintiff's Exhibit No. 5.)

Q. Can you identify Plaintiff's Exhibit 5, Mr. Swartz, as a copy of the Eighty-Third Annual Report of the State Board of Insurance for the year ending August 31, '58?

A. Yes, sir.

Q. Would you please turn to page 70? On the top of page 70 of Plaintiff's Exhibit 5 is a Statement of Revenues Collected by the Insurance Commission in the year '57-58, is it not, Mr. Swartz?

[fol. 40] A. Yes, sir.

Q. Is the top entry on page 70 of Plaintiff's Exhibit 5, Company Occupation Taxes cleared to Omnibus Fund 120 in the amount of twenty-six million some odd dollars?

A. Yes, sir.

Q. All right, sir. Now, did you bring with you a break-

Mr. Vickery: Mark this, please, as Plaintiff's Exhibit 6.

(Thereupon the document referred to was marked for identification as Plaintiff's Exhibit No. 6.)

Q. Mr. Swartz, the Plaintiff's Exhibit 5 did not contain an itemized list of those occupation taxes cleared to the Comptroller, did they, sir?

A. No, sir.

Q. Is Plaintiff's Exhibit 6 an itemized list of the twenty-six some odd million dollars worth of occupation taxes collected by the Insurance Commission in the '57-58 year?

A. Yes, sir.

Q. And does it show a collection from insurance pur-[fol. 41] chased from unauthorized insurers as \$22,145.46?

A. Yes, sir, that is right.

Q. Then you reported this 21.38(2)(c) tax as an occupation tax for '57-58, did you not?

A. Yes, sir.

Mr. Vickery: We offer Plaintiff's Exhibits 4, 5, and 6.

(Thereupon the documents which had been previously marked for identification as Plaintiff's Exhibits Nos. 4, 5, and 6, respectively, were received in evidence, and same accompany this Statement of Facts as original exhibits by agreement of counsel and order of the Court.)

Q. You heard Mrs. Gardner testify that she transfers these taxes under this Article 21.38(2)(c), to the Comptroller under the Classification 133, and later 155, did you not?

A. Yes, sir.

Q. Are the Classifications 133 and 155 occupation tax classifications?

A. Yes, sir. As well as I remember, it is. I am pretty sure it is.

Q. Do you know how these taxes happened to be forwarded to the Comptroller under the classification of occupation taxes?

A. No, I don't know.

Mr. Vickery: No further questions.

[fol. 42] Mr. Shannon: I have no questions.

The Court: All right; you are excused.

(Witness excused.)

Mr. Vickery: Mr. Jackson, please.

PENN J. JACKSON, called as a witness by plaintiff, being duly sworn by the Clerk, testified as follows:

Direct examination.

Questions by Mr. Vickery:

Q. Would you state your name, please, sir?

A. Penn J. Jackson.

Q. Mr. Jackson, do you live here in Austin now?

A. Well, my legal residence is in Clebourne, but I work here about six days a week, and have a residence here.

Q. And what position do you hold here, sir?

A. Chairman of the State Board of Insurance.

Q. And how long have you held that position as Chairman of the State Board of Insurance?

A. Since the last few days of June, 1957.

Q. Then you assumed your duties at about the time the statute that we are talking about was passed?

A. Well, it was after the Legislature adjourned.

Q. Shortly afterwards? You were a judge for many years, were you not?

[fol. 43] A. Yes, sir.

Q. And you are a licensed attorney, are you not?

A. Yes, sir.

Q. What duties and responsibilities does the State Board of Insurance have in connection with determining the nature and classification of the moneys collected under Article 21.38(2)(e), of the Insurance Code?

A. Well, that is a broad question. Of course, the State Board of Insurance under Senate Bill 222, to reorganize the insurance regulatory authority, vested all authority and responsibilities for the regulation of insurance in Texas in a three-member State Board of Insurance, and then it describes what our primary duties are. Although we have full responsibility, we appoint a Commissioner,

down or itemization of the moneys you reported as occupation taxes as comprised in that twenty-six million?

A. Yes, sir.

Q. We better mark this as Plaintiff's Exhibit 6, because it was not a part of this report.

A. Okay.

who has executive and administrative duties, and as to his acts the Board is an appellate body. Generally you would say that the duties of the State Board of Insurance, in the narrow sense, the three-member Board, is on matters of policy in making the rules, in making the rates, and hearing appeals from the Commissioner. Now, as to the specific question you asked me, I think that would be administrative. It has been handled that way, and the State Board of Insurance in its narrow sense of the three-member Board would have appellate jurisdiction. If somebody wanted to appeal from an act or decision of the Commissioner, they would appeal to the Board.

[fol. 44] Q. Then you think it is the responsibility of the Commissioner to make the decision as to the nature of moneys collected under this statute; is that correct?

A. Well, I think so. If anybody didn't like what he decided, they could have brought it before the Board.

Q. Was that ever done?

A. No, sir.

Q. Has the Board ever taken any official action as to the nature or classification of moneys collected under this Statute 21.38(2)(e)?

A. No, sir.

Q. Did you know prior—when did you first learn that these moneys were being treated as an occupation tax by the State Board of Insurance?

A. I think probably I learned it for sure this morning when I heard the testimony.

Q. Then you had no prior knowledge of it prior to this morning?

A. No, not personally.

Q. Then you didn't know that one-fourth of this money was being paid into the public free school fund?

A. I don't think I did. I had never had an occasion to look into the—

Q. Do you have any regulation on where Todd buys insurance,—where the plaintiff buys its insurance?

A. Have any what?

[fol. 45] Q. Regulation; do you try in any way to regulate from whom they buy?

A. I don't think so, not that I know of. There are statutes on the subject perhaps, but we have no specific rules on that that I know of.

Q. Well, what statutes do you have?

Mr. Shannon: Your Honor, we want to object.

Mr. Vickery: We will withdraw it, Your Honor.

Q. So far as you know, no attempt is made by the State Board of Insurance to regulate where or from whom Todd buys insurance; is that correct?

A. No, sir, not that I know of, except in so far as the statutes require duties to be performed in reference to such matters.

Mr. Vickery: No further questions.

Mr. Shannon: We have no questions.

(Witness excused.)

Mr. Vickery: Mr. Harrison.

---

WILLIAM A. HARRISON, a witness called by the plaintiff, being duly sworn by the Clerk, testified as follows:

Direct examination.

Questions by Mr. Vickery:

Q. Would you state your name, please, sir?

[fol. 46] A. William A. Harrison.

Q. Mr. Harrison, are you a resident of Austin?

A. Yes, sir.

Q. What position do you hold here in Austin in the State Government?

A. Commissioner of Insurance.

Q. And how long have you held the position of Commissioner of Insurance, Mr. Harrison?

A. Since June 21, 1957.

Q. Are you familiar with the Eighty-Third and Eighty-Fourth Annual Reports of the State Board of Insurance?

A. Yes, sir.

Q. I believe you signed those, did you not?

A. Yes, sir; they were prepared under my supervision.

Q. That is a statutory report that you make to the Governor, is it not?

A. That is correct.

Q. You have heard the testimony that these taxes collected under Code 21.38(2)(c),—you have heard the testimony that the moneys collected under 21.38(2)(c) are being forwarded to the Comptroller as occupation taxes, have you not?

A. Yes, sir.

Q. Did you participate in the decision or make the decision to so pay those—to so forward that money as occupation taxes?

[fol. 47] A. I made no specific decision on it, but I did know that it was being done.

Q. When did you first know that it was being done?

A. Now, your (2)(c) that you are talking about is the tax paid by the insured?

Q. Yes, sir, other than—

A. I knew that approximately at the time that was begun, which, I believe, was in the summer of 1957.

Q. Did that meet with your approval,—did you think it was the correct way to do it?

A. Well, I made no specific—I issued no specific approval, no order, or anything like that, but I knew it was being done that way.

Q. Well, your acquiescence in it was some measure of approval, was it not?

A. Well, possibly so. I think the State Comptroller has some responsibility in that matter, also.

Q. Well, did you leave it up to the Comptroller?

A. Yes, sir.

Q. And you left it up to the Comptroller pretty much as to how it would be classified?

A. Yes, sir.

Q. Then nobody in the Insurance Department really made the decision; is that correct?

A. I don't know that I can say no one did. I did not make a specific decision myself.

[fol. 48] Q. Did Mr. Conner make one, or do you know?

A. I don't know.

Q. Now, do you have—do you do anything to try to regulate where or from whom Todd Shipyards buys its insurance?

A. No, sir.

Mr. Vickery: No further questions.

Mr. Shannon: I have no questions.

(Witness excused.)

Mr. Vickery: Mr. Boone.

C. O. BOONE, called as a witness by plaintiff, being duly sworn by the Clerk, testified as follows:

Direct examination.

Questions by Mr. Vickery:

Q. Would you state your name, please, sir?

A. C. O. Boone.

Q. Mr. Boone, are you an Austin resident, sir?

A. Yes, sir.

Q. And what position do you hold here in Austin?

A. Assistant Treasurer of Accounting and Statistics with the State Comptroller's Department.

Q. And how long have you held that position with the Comptroller?

A. Approximately starting since October of 1942.

[fol. 49] Q. Since October of 1942?

A. That's right.

Q. Are you familiar with the occupation taxes that are cleared—what phrase do you use,—cleared or forwarded to the Treasurer and to the Comptroller by the State Board of Insurance?

A. We usually refer to those as deposits to, or actually they bring it to the Treasurer, and we refer to it as a deposit to those funds.



Q. Are you familiar with the deposits that the insurance companies made under the classification of 133 and 155?

A. Yes, sir.

Q. Did you bring with you this morning a list of the Comptroller's identifications of these different accounts?

A. I have.

Q. All right, sir. Do you recall the date of the change from Account No. 133 to 155?

A. It was effective September 1, 1959.

Q. What do your Comptroller's records show as Account No. 133 to be?

A. 133 is "Occupation Tax on Insurance Companies."

Q. And what is 155?

A. 155, the terminology we use now is "Insurance Companies Occupation Tax."

Q. Then the Comptroller's Account Nos. 133 and 155 have been assigned to Insurance Companies Occupation [fol. 50] Taxes, have they not?

A. That's right.

Q. Now, would you tell the Court, please, what has been the allocation of the moneys forward to or deposited with the Comptroller and the Treasurer under the Classifications 133 and 155 by the State Board of Insurance?

A. That is placed in the omnibus fund, and at the end of each month, or at the present time on the fifth working day, any collection that is made between the first and the fifth is allocated one-fourth to the public free school fund, which in our accounts is designated as the Available School Fund 2. The balance is left in omnibus, intermingled with other taxes, and then is allocated according to the requirement of the statutes giving priority to various funds.

Q. Have you set aside or transferred to the public free school fund one-fourth of the moneys that you have received from the State Board of Insurance under Classifications 133 and 155 since June 1st of 1957?

A. We have. All of the moneys that have went into the omnibus fund—now, I might explain that—by the Insurance Department, and they do designate the final revenue classification. They place that into suspense, and then clear from suspense to the omnibus fund. Any money that

is put into suspense under protest would not be transferred into the omnibus fund, and therefore no part of [fol. 51] that, but all of that type of money that is deposited into 133 or 155 is allocated one-fourth to available and then the balance as provided by statute.

Q. Now, when you say one-fourth is allocated to the available, what do you mean?

A. I mean the public free school fund as it is generally termed by the average person.

Q. The Comptroller merely calls the public free school fund the available fund, is that right?

A. That is the designation in the State's accounts on that particular type.

Q. And the available fund and the public free school fund are synonymous, are they not, as you use them?

A. That is true.

Q. Why have you transferred one-fourth of these occupation taxes received from the State Board of Insurance under Classifications 133 and 155 to the available or public free school fund?

A. The Constitution provides that one-fourth of all occupation taxes shall go to the public free schools.

Q. Then, you have done it because you are complying with the Constitutional requirement for occupation taxes?

A. That is right.

Q. Now, did you bring with you a copy of the Comptroller's Annual Report for 1959?

A. I do not have one with me.

[fol. 52] Q. I have one somewhere here.

A. If you will tell me what you want, I will be able to find one.

Q. I want to find the insurance occupation—the list of the State's receipts where it shows how much you got from each source.

A. You are talking about this omnibus tax clearance?

Q. Well, the list of revenues from the State.

A. All right. Here you have got your revenues from the State, these receipts, Table 3, starting—

Q. All right. Will you mark this, please, and we will offer it in evidence.

(Thereupon the document referred to was marked for identification as Plaintiff's Exhibit No. 7, and same was received in evidence, and accompanies this Statement of Facts as an original exhibit by agreement of counsel and order of the Court.)

Q. I hand you Plaintiff's Exhibit No. 7, Mr. Boone, and ask you if you can identify this as the 1959 Annual Report of the Comptroller of Public Accounts?

A. It is.

Q. Would you please turn to page 2? Does page 2 contain a table showing the State's receipts?

A. It does.

Q. Do you have in Table No. 1 an entry "Insurance Companies Occupation Tax"?

[fol. 53] A. We do.

Q. Under Insurance Companies Occupation Tax, what did the State receive during the fiscal year ending August 31, 1959?

A. \$28,512,716.43.

Q. What percentage was that of the entire receipts of the State?

A. .0250.

Q. Did you also show in the State's receipts another revenue called "Insurance Companies Regulation Tax"?

A. We did.

Q. And what was the amount included under Insurance Companies Regulation Tax?

A. \$1,831,870.02.

Q. What percentage of the State revenue was that?

A. .0016.

Q. Now, these moneys paid to you under Classifications 133 and 155 are included on page 2 of Plaintiff's Exhibit 7 as Insurance Companies Occupation Tax, are they not?

A. That is right.

Q. And those moneys that Mrs. Gardner sends to you under Classifications 133 and 155 are not included under the entry, "Insurance Companies Regulation Tax," on page 2 of Plaintiff's Exhibit 7, are they?

A. No, sir, they are not.

Mr. Vickery: No further questions.

[fol. 54] Cross examination.

Questions by Mr. Shannon:

Q. I have one or two questions.

A. All right, sir.

Q. They are in reference to the omnibus fund. Now, is it true that there are more than one type of tax cleared to the omnibus fund?

A. Deposited into omnibus, that is true.

Q. I see. Now, you said that one-fourth of the omnibus fund is allocated to the available fund?

A. That is true.

Q. Well, how do you know, then, which tax from the omnibus fund this one-fourth comes from? Doesn't it come into one fund and then you just withdraw one-fourth from the fund itself?

A. No, sir. This designation of 133 and 155 ties it down to a specific source. We carry separate ledger sheets on each of those sources to where that we can identify it by source. And then at the end of the month we make up a work sheet showing each of these types of taxes; and then, of course, go ahead and allocate them. On some of the taxes there is a provision that of the total amount that part of it shall be for regulation tax or enforcement tax. We figure that into it. But each group of those taxes that go into omnibus, there is a separate sub-account that is [fol. 55] carried into that to keep up with that specific type of tax.

Mr. Shannon: I have no further questions.

Redirect examination.

Questions by Mr. Vickery:

Q. Mr. Boone, there is no doubt that the money you received from the Insurance Board under Classifications 133 and 155 that one-fourth of those entire deposits went to the public free school fund, is there, sir?

A. Under the interpretation that has been put on it and followed there, we would refuse to accept them any other way, without the advice and the opinion of the Attorney General.

Q. Well, you have treated them as occupation taxes, have you not?

A. We have.

Q. And you have cleared one-fourth of it to the public free school fund as an occupation tax?

A. That is right.

Mr. Vickery: No further questions.

(Witness excused.)

---

Mr. Vickery: Plaintiff rests, Your Honor.

Mr. Shannon: That is all we have, Your Honor.

[fol. 56] The Court: All right.

Mr. Vickery: Plaintiff closes.

Mr. Shannon: Defendant closes.

---

Testimony Closed.

---

[fol. 57] Reporter's Certificate to foregoing transcript (omitted in printing).

•

[fol. 61]

## PLAINTIFF'S EXHIBIT No. 1

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

53RD JUDICIAL DISTRICT

No. 112,081

---

TODD SHIPYARDS CORPORATION,

vs.

BOARD OF INSURANCE COMMISSIONERS, et al.

---

## STIPULATION OF FACTS

It is stipulated and agreed by and between the parties hereto that each of the following recitations is true and correct and that this stipulation may be introduced in evidence on the trial of this case and as conclusive proof of each such recitation.

Article 21.38 of the Texas Insurance Code deals with insurance with unauthorized insurers. Subsection (e) of Section 2 of that Act levies a tax on the gross premiums paid by any person, firm, association or corporation which purchases insurance covering risks within Texas from an insurer not licensed by the State of Texas in a manner other than through an insurance agent licensed under the laws of Texas.

Todd Shipyards Corporation, hereinafter called "Todd" and "Plaintiff", is a New York corporation duly licensed to do business in Texas, and since 1934 has owned certain real and personal properties located in Texas of a value exceeding \$900,000.00, and Todd has purchased certain insurance agreements covering Texas risks on the dates and for the premium payments set forth in Exhibit "A" from the Lloyds of London and Institute of London Underwriters, and copies of each of these policies are attached as Exhibit "B". Only transactions and agreements with Lloyds of London and the Institute of London Underwriters

are involved in this case and each of such insurers is domiciled in London, England.

Each of the policies attached and made the basis of this suit was contracted for, delivered and paid for in the City of New York and State of New York, the domicile of Todd Shipyards Corporation.

[fol. 62] As demanded by the State Board of Insurance of Texas (formerly Board of Insurance Commissioners) and in compliance with Subsection (e) of Section 2 of Article 21.38 of the Texas Insurance Code, Todd Shipyards Corporation has duly paid the unadmitted insurers tax levied on such premium payments under protest and has duly complied in all respects with the Texas Protest Statute, Article 7057b; the dates and amounts of the tax payments under protest are itemized on Exhibit "A".

Neither Lloyds of London nor the Institute of London Underwriters conducts any investigation of Texas claims in Texas, but the adjustment of losses, if, as and when occurring, are handled between Todd's agent in the New York office and the agent of Lloyds of London and the Institute of London Underwriters in New York City.

Neither Lloyds of London nor the Institute of London Underwriters has ever solicited Todd's insurance business or policies within the State of Texas.

The Texas plants or offices of Todd Shipyards Corporation do not correspond directly or indirectly nor conduct any negotiations or transactions directly or indirectly with Lloyds of London or the Institute of London Underwriters but all negotiations or transactions are handled by Todd's agent, Mr. Ed Costello, in New York City with the New York City Agents of the insurer or directly with the London office.

All decisions relative to the purchase of insurance and renewal of insurance, the extent and amount of coverage, the selection of insurers and confirmation of insurance contracts are made by Mr. Ed Costello in New York City acting for Todd Shipyards Corporation, and not in Texas.

Under these policies all losses are payable in New York City and all losses have in fact been paid in New York City. All premiums are payable in New York City and have been paid in New York City.



[fol. 63] The tax levied by the State on premiums paid by Todd Shipyards Corporation on policies purchased from Lloyds of London and the Institute of London Underwriters, "unadmitted insurers", is at the rate of five per cent (5%) of the gross premiums. The tax on similar premiums paid to admitted insurers and persons transacting an insurance business in the State of Texas is at rates of a maximum of 3.85% to a minimum of 1.1% (Article 21.38, Texas Insurance Code and Article 7064 of Texas Revised Civil Statutes).

Todd Shipyards has its principal office, principal place of business and domicile in New York City, New York. Todd maintains and operates shipyards in New Jersey, Louisiana, Texas, California, Washington and South America.

Todd's Texas plants are located at Pelican Island in Galveston County, Texas, and on the Houston Ship Channel in Harris County, Texas. Todd duly obtained a certificate of authority to do business in Texas issued by the Secretary of State of Texas in 1934 and has maintained such certificate in good standing to this date, and has duly filed all reports and paid all taxes, fees and charges levied against Todd for the privilege of doing business as a foreign corporation in Texas for the purposes of this case, but without prejudice to any claim the State may have or later assert.

Since 1934 the Plaintiff, Todd Shipyards Corporation, has made large investments in real and personal properties essential to the conduct of its shipyard business which it has held and operated continuously since 1934.

Approximately 27% of the Plaintiff's volume of business was done in Texas in each of the years 1956, 1957, 1958 and 1959. The number of employees at the Texas plants varies with the amount of work, but in November, 1959, the number of employees was about 1500.

The principal type of activity performed at the Texas plants is similar to that in other plants located in other [fol. 64] states, and the Galveston and Houston, Texas shipyards activity consists mainly of ship repair and conversion of ships from one type to another, construction of



vessels, various types of metal fabrication and construction, as well as the manufacture of industrial equipment and oil burners.

For protection of the Plaintiff's property located in Texas and for protection against risks arising out of the use of Plaintiff's property, the Plaintiff purchases several types of insurance agreements including:

- (1) Industrial work property damage insurance
- (2) Builders' risk insurance
- (3) Dry dock insurance
- (4) Pier and bulkhead collision insurance
- (5) Product liability insurance, to the extent of the excess portion of that insurance.

The Plaintiff purchases the above enumerated types of insurance agreements and the insurance coverage set forth in the attached policies from Lloyds of London and the Institute of London Underwriters.

Lloyds of London does not have a permit from the Texas State Board of Insurance to write insurance in Texas, nor does it submit any statements of its condition to the Texas State Board of Insurance, nor are the affairs of Lloyds in any way subject to examination by the Texas State Board of Insurance, nor does the State Board of Insurance have any control or supervision over its affairs. The Institute of London Underwriters does not have a permit from the Texas State Board of Insurance to write insurance in Texas, nor does it submit any statements of its condition to the Texas State Board of Insurance, nor are the affairs of the Institute of London Underwriters in any way subject to an examination by the Texas State Board of Insurance, nor does the Texas State Board of Insurance have any control or supervision over its affairs.

[fol. 65] Neither Lloyds of London nor the Institute of London Underwriters has an office or agent in the State of Texas. At any time material to this law suit, neither Lloyds of London nor the Institute of London Underwriters had an office or agent in the State of Texas.

The Plaintiff has purchased the types of coverages provided for in the attached policies on its Texas properties since 1934. The policies of insurance of the types enumerated above and attached hereto are purchased for the Plaintiff from Lloyds of London and the Institute of London Underwriters by the following insurance brokerage companies: (1) Johnson & Higgins of New York City, New York, (2) Griswold Company of New York City, New York, (3) Marsh & McLennan, Inc., of New York City, New York, and (4) Hogg, Robinson and Kapell-Cure (Canada), Ltd., of Toronto, Canada. None of such brokers is an insurance agent licensed under the laws of the State of Texas. The attached policies of insurance are signed and issued by Lloyds of London and the Institute of London Underwriters in London, England, and it is stated in the policies that the place of physical and actual issue and delivery of the policy is London, England, but as between the insured and insurer, the place of issue may be considered New York City, New York, at the option of the insured under the agreement. The attached policies were accepted by Todd Shipyards Corporation in New York City in the State of New York.

These insurance policies are issued for one year terms except in the case of the builders' risk insurance. Such policies are renewed from year to year by the payment of additional premiums in New York to New York agents of the insurers. The renewal is negotiated and agreed upon between the New York broker and the Plaintiff's New York agent, Ed Costello, in New York City, New York, sometime before the expiration of the particular policy of insurance when the broker that sold such policy to the Plaintiff inquires of the Plaintiff's New York office [fol. 66] whether or not it wishes to continue its coverage with Lloyds or the Institute of London Underwriters. The Plaintiff's New York office then notifies the New York broker in New York of its decision to continue or discontinue its coverage with Lloyds and the Institute of London Underwriters and then the Broker notifies Lloyds and the Institute of London Underwriters. Then, the New York office of the Plaintiff notifies the Plaintiff's Texas plants that the insurance agreement has been renewed.

The premiums on each of the insurance policies are paid by and mailed from the Plaintiff's New York office to the New York office of the Broker. No premium is paid by or from the Texas plants or offices.

The New York office sends the Texas plant copies of the policies insuring such Texas Plant's risks.

In the case of builder's risk insurance, the Texas office of the plaintiff notifies Mr. Ed Costello in New York, the Plaintiff's New York insurance man, that Todd has entered into a construction or repair contract. Mr. Costello then applies to one of the New York insurance brokers for builder's risk insurance coverage on that particular vessel or contract; this application letter is signed by Mr. Costello in New York, an officer of the New York office, but the coverage is requested in the name of the Corporation's Texas division and identifies Texas as the place where the work is to be performed.

When a loss occurs at the Texas plants of the Plaintiff, the Texas plant informs Mr. Costello at the Plaintiff's New York office by telephone or memorandum. Mr. Costello in New York then notifies in New York the New York brokerage house in New York that negotiated the insurance; the New York broker in turn appoints the London Salvage Association to prepare an estimate or "survey" of the loss. A copy of a typical survey is hereto attached as Exhibit "C". In some instances, the Plaintiff's New York office notifies the London Salvage Association that a survey is requested. The Texas plant of the Plaintiff also [fol. 67] appraises the amount of Plaintiff's loss. After appraisal, the London Salvage Association forwards its estimate or survey to the Plaintiff's New York office, and Plaintiff then submits the survey to the particular insurance broker to be used in adjusting the amount of the loss. The local plant of the Plaintiff assists the London Salvage Association in arriving at a fair figure for the loss. The London Salvage Association issues a bill to Todd Shipyards for the London Salvage Association's services, and such bill is paid in New York City by Todd Shipyards Corporation.

The adjusting of the loss is carried on by Lloyds through the insurance broker in New York and Mr. Costello in

New York. The insurance broker submits its adjustment figure and recommendation to Lloyds in London and the Institute of London Underwriters for final approval. After the figure and adjustment of loss is approved, the New York office is notified by the insurance broker or the underwriter and the New York office then notifies the Texas plants that the claim will or will not be paid.

However, each party reserves the right to introduce other evidence at the time of the trial so long as such evidence is not offered to contradict any of the agreed recitations.


Will Wilson, Attorney General of Texas, Fred B. Werkenthin, Assistant Attorney General, Bob E. Shannon, Assistant Attorney General, Attorneys for Defendant, Capitol Station, Austin 11, Texas.

[fol. 68] Liddell, Austin, Dawson & Huggins, By Charles R. Vickery, Jr., By Meyer W. Witt, Attorneys for Todd Shipyards Corporation, 510 Gulf Building, Houston 2, Texas.

---

[fol. 71]

EXHIBIT "A" TO STIPULATION OF FACTS

(See opposite) 

**TODD SHIPYARDS CORPORATION  
(GALVESTON DIVISION)  
SCHEDULE OF TAX, PENALTY AND INTEREST  
UNADMITTED INSURANCE  
DECEMBER 17, 1959**


Type of Insurance	Covered by Policy		Date Premium Paid	Premiums Involved	Tax
Dry Dock Ins. (Incl. Strikes, etc.) Todd Owned	Lloyd's London	#542/H.D. 9330			
D.D. #1 & #2	Institute of London Underwriters	do	7-24-57	32,800.94	1,640.00
do	do	do	7- 3-58	32,800.94	1,640.00
do	do	do	7- 9-59	32,800.94	1,640.00
				<u>98,402.82</u>	<u>4,920.00</u>
Dry Dock Ins. (Incl. Strikes, etc.) Navy Owned					
D.D. AFDM-1	do	#542/H.D. 3193	9-18-57	19,500.47	975.00
do	do	do	9-29-58	19,500.47	975.00
do	do	do	9-21-59	18,750.00	937.50
				<u>57,750.94</u>	<u>2,887.50</u>
Plant and/or Piers - Collision, Flood, Subsidence and Collapse Ins.	do	#509/59/BI 468/JY	6-28-57	9,900.00	495.00
Plant and/or Piers - Collision, Flood, Subsidence and Collapse Ins. - Reinstatement of Loss 5/20/57	do	do	6-27-58	76.63	3.82
Plant and/or Piers - Collision, Flood, Subsidence and Collapse Ins. - Reinstatement of Loss 9/20/57	do	do	7-11-58	5.43	.26
Plant and/or Piers - Collision, Flood, Subsidence and Collapse Ins. - Collision, etc.	do	do	7-11-58	10,968.75	548.44
Plant and/or Piers - Collision, Flood, Subsidence and Collapse Ins. - Reinstatement of Loss 1/16/57	do	do	4- 4-58	12.63	.62
Plant and/or Piers - Collision, Flood, Subsidence and Collapse Ins. - Reinstatement of Loss 11/2/55	do	do	4- 4-58	53.79	2.68
Plant and/or Piers - Collision, Flood, Subsidence and Collapse Ins. - Collision, etc.	do	do	8-27-59	9,084.00	454.20
				<u>30,101.23</u>	<u>1,505.02</u>
Industrial Work Property Damage Ins.	Lloyd's London				
do	Institute of London Underwriters	#576/89514	12- 2-57	9.32	.47
do	do	do	11- 3-58	100.00	5.00
do	do	do	3-19-58	100.00	5.00
do	do	do	12- -59	125.00	6.25
do	do	do	5-11-59	10.69	.53
				<u>345.01</u>	<u>17.25</u>
Products Liability - Bodily Injury & Property Damage	Lloyd's London	(#542/59/137084)			
	Institute of London Underwriters	(#542/59/137085)	1-31-58	187.58	9.38
Bull & Mach. Incl. P&I Port Risk - Potrero del Llano	Lloyd's London	#576/86410			
do	Institute of London Underwriters	do	10- 4-57	322.74	16.13
do	- Gen. Lazaro Cardenas	do	4-18-58	906.25	45.31
do	- Vera Cruz	do	10- 4-57	242.10	12.10
do	- Gen. Lazaro Cardenas	do	6-27-58	35.00	1.75
do	- Atzacapotzalco	do	9-26-58	200.00	10.00
do	- Astaca	do	5- 1-59	322.58	16.13
				<u>2,028.67</u>	<u>101.42</u>
				<u>\$188,816.25</u>	<u>\$9,440.57</u>
					<u>\$1,</u>

TODD SHIPYARDS CORPORATION  
(GALVESTON DIVISION)  
SCHEDULE OF TAX, PENALTY AND INTEREST  
UNADMITTED INSURANCE  
DECEMBER 17, 1959

	Date Premium Paid	Premiums Involved	Tax	Penalty	Interest	Total	Date Tax Paid
#542/M.D. 9330							
ra do	7-24-57	32,800.94	1,640.00	410.00	120.98	2,170.98	9-16-58
do	7-3-58	32,800.94	1,640.00	410.00	5.05	2,055.05	9-16-58
do	7-9-59	<u>32,800.94</u>	<u>1,640.00</u>	-	-	<u>1,640.00</u>	8-20-59
		<u>98,402.82</u>	<u>4,920.00</u>	<u>820.00</u>	<u>126.03</u>	<u>5,866.03</u>	
#542/H.D. 3193							
do	9-18-57	19,500.47	975.00	243.75	60.70	1,279.45	9-16-58
do	9-29-58	19,500.47	975.00	-	-	975.00	10-1-58
do	9-21-59	<u>18,750.00</u>	<u>937.50</u>	-	-	<u>937.50</u>	10-16-59
		<u>57,750.94</u>	<u>2,887.50</u>	<u>243.75</u>	<u>60.70</u>	<u>3,191.95</u>	
509/59/Bil 468/JY							
do	6-28-57	9,900.00	495.00	123.75	39.16	657.91	9-16-58
do	6-27-58	76.63	3.83	.96	.02	4.80	9-16-58
do	7-11-58	5.43	.26	.07	-	.33	9-16-58
do	7-11-58	10,968.75	548.44	137.11	.79	686.34	9-16-58
do	4-4-58	12.63	.62	.16	.01	.79	9-16-58
do	4-4-58	53.79	2.68	.67	.06	3.41	9-16-58
do	8-27-59	<u>9,084.00</u>	<u>454.20</u>	-	-	<u>454.20</u>	10-16-59
		<u>30,101.23</u>	<u>1,505.02</u>	<u>262.72</u>	<u>40.04</u>	<u>1,807.78</u>	
ra #576/89514							
do	12-2-57	9.32	.47	.12	.02	.61	9-16-58
do	11-3-58	100.00	5.00	1.25	.38	6.63	12-17-59
do	3-19-58	100.00	5.00	1.25	.12	6.37	9-16-58
do	12-5-59	125.00	6.25	-	-	6.25	12-17-59
do	5-11-59	<u>10.69</u>	<u>.53</u>	<u>.13</u>	-	<u>.66</u>	8-20-59
		<u>345.01</u>	<u>17.25</u>	<u>2.75</u>	<u>.52</u>	<u>20.52</u>	
(#542/59/137084							
ra (#542/59/137085	1-31-58	<u>187.58</u>	<u>9.38</u>	<u>2.35</u>	<u>.32</u>	<u>12.05</u>	9-16-58
#576/86410							
ra do	10-4-57	322.74	16.13	4.03	.95	21.11	9-16-58
#576/87974	4-18-58	906.25	45.31	11.33	.85	57.49	9-16-58
#576/86411	10-4-57	242.10	12.10	3.03	.72	15.85	9-16-58
#576/87974	6-27-58	35.00	1.75	.44	.01	2.20	9-16-58
#576/89399	9-26-58	200.00	10.00	-	-	10.00	10-1-58
#576/91100	5-1-59	<u>322.58</u>	<u>16.13</u>	<u>4.03</u>	<u>.17</u>	<u>20.33</u>	8-20-59
		<u>2,028.67</u>	<u>101.42</u>	<u>22.86</u>	<u>2.70</u>	<u>126.98</u>	
		<u>\$188,816.25</u>	<u>\$9,440.57</u>	<u>\$1,354.43</u>	<u>\$230.31</u>	<u>\$11,025.31</u>	

## EXHIBIT "B" TO STIPULATION OF FACTS-1a

(Page 1)

(See opposite) 



52504 \* - 6 JUL 1956

No Policy or Contract dated on or after 1st Jan. 1956 will be recognised by the Committee of Lloyd's as entitling the holder to the benefit of the Funds and/or Guarantees lodged by the Underwriters of the Policy or Contract as security for their liabilities unless it bears at foot the Seal of Lloyd's Policy Signers.

(No.



Any person not an Underwriting Member of Lloyd's subscribing this Policy, or any person uttering the same if so subscribed, will be liable to be proceeded against under Lloyd's Acts.

**S.G.**

**B** \$869.815, part of 10% of Total Valuation as attached.

Printed at Lloyd's, London, England.

20-10-55

**Be it known that** AS PER SCHEDULE ATTACHED,

as well in their own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in part or in all, doth make Assurance, and cause themselves and them and every of them, to be insured, lost or not lost, at and from

and for and during the space of TWELVE CALENDAR MONTHS  
Commencing Noon 6th June 1956  
and ending Noon 6th June 1957  
beginning and ending with New York Standard Time.

upon any kind of Goods and Merchandises, and also the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel called the *WILLIAM LLOYD* as per schedule attached hereto and forming part of this policy.

whereof is Master, under God, for this present Voyage, or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the same Ship, or the Master thereof, is or shall be named or called, beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the said Ship as above upon the said Ship, &c., as above and shall so continue and endure during her Abode there, upon the said Ship, &c.; and further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods and Merchandises whatsoever, shall be arrived at as above upon the said Ship, &c., until she hath moored at Anchor ~~Toronto~~ *in good Safety*, and upon the Goods and Merchandises until the same be there discharged and safely landed; and it shall be lawful for the said Ship, &c., in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever and wheresoever for all purposes without Prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured by Agreement between the Assured and Assurers in this Policy, are and shall be valued at CASH AND DRY L CASH as per schedule attached.

Valued as per schedule attached.

SUBJECT TO MY BOOK FORM AS ATTACHED.

Subject to the Service of Brit Clauses as attached.

Including Waiver of Navigation against United States Government as attached.

Including Towage Contracts Clause as attached.





2	2.025%	Dock No. 1 Caisson for Graving Dock No. 2	1 Unit	50,000.	"	
3	1.80%	Dry Dock No. 3	5 Sections	650,000.	"	\$130,000, less proportionate share of value of equipment ashore, if any.
4	1.80%	Dry Dock No. 4	6 Sections	1,000,000.	"	\$166,667, less proportionate share of value of equipment ashore, if any.
5	1.80%	Dry Dock No. 6	5 Sections	800,000.	"	\$160,000, less proportionate share of value of equipment ashore, if any.

**NEW YORK HARBOR  
(Hoboken Division)**

6	1.80%	Dry Dock No. 1	1 Unit (Box Dock)	100,000.	"	
7	1.80%	Dry Dock No. 2	1 Unit (Box Dock)	100,000.	"	
8	1.80%	Dry Dock No. 3	1 Unit (Box Dock)	250,000.	"	
9	1.80%	Dry Dock No. 4	5 Sections	750,000.	"	\$150,000, less proportionate share of value of equipment ashore, if any.
10	1.80%	Dry Dock No. 5	1 Unit (Box Dock)	75,000.	"	
11	1.80%	Dry Dock No. 6	1 Unit (Box Dock)	125,000.	"	
12	1.80%	Dry Dock No. 7	1 Unit (Box Dock)	125,000.	"	
13	1.80%	Dry Dock No. 8	1 Unit (Box Dock)	60,000.	"	

**NEW ORLEANS, LA.  
(New Orleans Division)**

14	1.80%	Dry Dock No. 1	6 Sections	1,000,000.	"	\$134,000. 1 from upstream end \$358,000. " " 2 " " " \$102,000. " " 3 " " " \$102,000. " " 4 " " " \$170,000. " " 5 " " " \$134,000. " " 6 " " " less proportionate share of value of equipment ashore, if any.
15	1.25%	Damaged Dry Dock Sec. (Formerly part of Dry Dock No. 1)	1 Section	100,000.	"	
16	2.025%	Dry Dock No. 8	5 Sections	500,000.	"	2 end Sections, \$115,000. each, 3 in-between Sections, \$90,000. each, less proportionate share of value of equipment

**S.G.**

**B** "S.G. 515, part of 100,  
of Total Valuation as  
attached.

Printed at Lloyd's, London, England.

10-10-55

as per schedule attached hereto and forming part of this policy.

whereof is Master, under God, for this present Voyage,  
or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the same  
Ship, or the Master thereof, is or shall be named or called, beginning the Adventure upon the said Goods  
and Merchandises from the loading thereof aboard the said Ship as above  
upon the said Ship, &c., as above and shall so continue and endure during  
her Abode there, upon the said Ship, &c.; and further, until the said Ship, with all her Ordnance, Tackle,  
Apparel, &c., and Goods and Merchandises whatsoever, shall be arrived at as above  
upon the said Ship, &c., until she hath moored at Anchor ~~Town of London~~ in good Safety, and upon the  
Goods and Merchandises until the same be there discharged and safely landed; and it shall be lawful for the  
said Ship, &c., in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever  
and wheresoever for all purposes  
without Prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns  
the Assured by Agreement between the Assured and Assurers in this Policy, are and shall be valued at  
CASH AND DRY LUGGAGE as per schedule attached.

Valued as per schedule attached.

SUBJECT TO MY BACK FORM AS ATTACHED.

Subject to the Service of Suit Clauses as attached.

Including Waiver of Arbitration against United States as attached.

Including Towage Contracts Clause as attached.

**Touching** the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of  
the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at  
Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition, or Quality soever, Barratry  
of the Master and Mariners, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or  
Damage of the said Goods and Merchandises and Ship, &c., or any Part thereof; and in case of any Loss or Misfortune, it shall be  
lawful to the Assured, their Factors, Servants and Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard and  
Recovery of the said Goods and Merchandises and Ship, &c., or any Part thereof, without Prejudice to this Insurance; to the Charges  
whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his Sum herein assured. And it is  
especially declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property insured, shall  
be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Insurers, that this Writing or Policy of  
Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street,  
or in the Royal Exchange, or elsewhere in London.

Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt to  
also from the consequences of hostilities or warlike operations, whether there be a declaration of war or not; but this warranty shall  
not exclude collision, contact with any fired or floating object (other than a mine or torpedo), stranding, being another vessel, or  
caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any  
other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and the purpose of this warranty  
"power" includes any authority maintaining naval, military or air forces in association with a power.

Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom  
or piracy.

And so we, the Assurers, are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs,  
Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises,  
confessing ourselves paid the Consideration due unto us for this Assurance by the Assured  
at and after the Rate of rates as attached.

**Touching** the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Goods and Merchandises and Ship, &c., or any Part thereof; and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants and Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard and Recovery of the said Goods and Merchandises and Ship, &c., or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his Sum herein assured. And it is especially declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London.

*Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt at the same, also from the consequences of hostilities or warlike operations, whether there be a declaration of war or not; but this warranty shall not exclude collision, contact with any fired or floating object (other than a mine or torpedo), stranding, heaving down, or any other accident caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power.*

*Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising between or among powers or piracy.*

And so we, the Assurers, are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured at and after the Rate of rates as attached.

IN WITNESS whereof we, the Assurers, have subscribed our Names and Sums assured in LONDON, at the City of London, as hereinafter appears.

N.B.—Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are warranted free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent., unless general, or the Ship be stranded.

**How know ye,** that We the Assurers, members of the Syndicate(s) whose definitive Number(s) in the attached list are set out in the Table overleaf, or attached overleaf, hereby bind Ourselves, each for his own part and not one for another, and in respect of his due proportion only, to pay or make good to the Assured all such Loss and/or Damage which he or they may sustain by any one or more of the aforesaid perils, and so that the due proportion for which each of Us the Assurers is liable shall be ascertained by reference to his proportion as ascertained according to the said List of the Amount, Percentage or Proportion of the total Sum assured which is in the said Table set opposite the definitive Number of the Syndicate of which such Assurer is a member.

IN WITNESS whereof the Manager of Lloyd's Policy Signing Office has subscribed his Name on behalf of each of Us.

LLOYD'S POLICY SIGNING OFFICE.

(12-11-39)  
(12-6-40)

(10 76)

(In the event of accident whereby loss or damage will be much facilitated if immediate

MANAGER

settlement



6	1.80%	Dry Dock No. 1	1 Unit (Box Dock)	100,000.	"	
7	1.80%	Dry Dock No. 2	1 Unit (Box Dock)	100,000.	"	
8	1.80%	Dry Dock No. 3	1 Unit (Box Dock)	250,000.	"	
9	1.80%	Dry Dock No. 4	5 Sections	750,000.	"	\$150,000, less proportionate share of value of equipment ashore, if any.
10	1.80%	Dry Dock No. 5	1 Unit (Box Dock)	75,000.	"	
11	1.80%	Dry Dock No. 6	1 Unit (Box Dock)	125,000.	"	
12	1.80%	Dry Dock No. 7	1 Unit (Box Dock)	125,000.	"	
13	1.80%	Dry Dock No. 8	1 Unit (Box Dock)	60,000.	"	

**NEW ORLEANS, LA.  
(New Orleans Division)**

14	1.80%	Dry Dock No. 1	6 Sections	1,000,000.	"	\$134,000. 1 from upstream end \$158,000. " " 2 " " " \$102,000. " " 3 " " " \$102,000. " " 4 " " " \$170,000. " " 5 " " " \$134,000. " " 6 " " " less proportionate share of value of equipment ashore, if any.
15	1.25%	Damaged Dry Dock Sec. (Formerly part of Dry Dock No. 1)	1 Section	100,000.	"	
16	2.25%	Dry Dock No. 8	5 Sections	500,000.	"	2 end Sections, \$115,000. each, 3 in-between Sections, \$90,000. each, less proportionate share of value of equipment ashore, if any.

**GALVESTON, TEXAS  
(Galveston Division)**

17	1.00%	Dry Dock No. 1	2 Sections	800,000.	"	Large Section \$520,000, small Section \$280,000, less proportionate share of value of equipment ashore, if any.
18	1.00%	Dry Dock No. 2	2 Sections	800,000.	"	Large Section \$520,000, small Section \$280,000, less proportionate share of value of equipment ashore, if any.

**HOUSTON, TEXAS  
(Products Division)**



each, 3 in-between Sections, \$30,000. each, less proportionate share of value of equipment ashore, if any.

**GALVESTON, TEXAS**  
**(Galveston Division)**

17	1.00%	Dry Dock No. 1	2 Sections	800,000.	"	Large Section \$520,000, small Section \$280,000, less proportionate share of value of equipment ashore, if any.
----	-------	----------------	------------	----------	---	--

18	1.00%	Dry Dock No. 2	2 Sections	800,000.	"	Large Section \$520,000, small Section \$280,000, less proportionate share of value of equipment ashore, if any.
----	-------	----------------	------------	----------	---	--

**HOUSTON, TEXAS**  
**(Products Division)**

19	1.00%	Dry Dock No. 2	6 Sections	1,500,000.	"	2 end Sections, \$270,000. each, 4 in-between Sections \$240,000. each, less proportionate share of value of equipment ashore, if any.
----	-------	----------------	------------	------------	---	--

20	1.00%	Damaged Dry Dock Sec. (Formerly part of Former Dry Dock No. 3)	1 Section	153,000.		
----	-------	--	-----------	----------	--	--

1. Anything herein to the contrary notwithstanding this insurance is warranted free from all claims of whatsoever nature (including claims under the collision, sue and labor and strikes, riots, etc. clauses) other than Total Loss and/or Constructive Total Loss which shall be paid in full, unless the aggregate of such claims arising out of each separate accident exceeds \$2,500., in which case this insurance shall be liable only for the amount by which such aggregate exceeds \$2,500.; and a recovery from other interests and/or parties shall not operate to exclude a claim under this insurance, providing the aggregate of the claims (as before) unreduced by such recovery amounts to \$2,500. For the purpose of this insurance each accident shall be treated separately, but it is agreed that a sequence of damages arising directly or indirectly from the same peril shall be treated as one accident. It is understood that the \$2,500. Deductible shall be applied in full to each Dry Dock or Caisson and shall not be pro rated over each Section and property on shore pertaining thereto.

2. In respect of Dry Docks consisting of more than one Section:

The Equipment forming a part of the Floating Dry Docks and Caissons situated on shore and not on the Docks (consisting of switchboards, transformers, electrical equipment, panels and all other similar equipment) and each

## EXHIBIT "B" TO STIPULATION OF FACTS—1a

(Page 2)

(See opposite) 

**HOUSTON, TEXAS**  
**(Products Division)**

19	1.1.1.	Dry Dock No. 2	6 Sections	1,500,000.	"	2 end Sections, \$270,000. each, 4 in-between Sec- tions \$240,000. each, less proportionate share of value of equipment ashore, if any.
20	1.1.1.	Damaged Dry Dock Sec. (Formerly part of Former Dry Dock No. 3)	1 Section	153,000.		

1. Anything herein to the contrary notwithstanding this insurance is warranted free from all claims of whatsoever nature (including claims under the collision, sue and labor and strikes, riots, etc. clauses) other than Total Loss and/or Constructive Total Loss which shall be paid in full, unless the aggregate of such claims arising out of each separate accident exceeds \$2,500., in which case this insurance shall be liable only for the amount by which such aggregate exceeds \$2,500.; and a recovery from other interests and/or parties shall not operate to exclude a claim under this insurance, providing the aggregate of the claims (as before) unreduced by such recovery amounts to \$2,500. For the purpose of this insurance each accident shall be treated separately, but it is agreed that a sequence of damages arising directly or indirectly from the same peril shall be treated as one accident. It is understood that the \$2,500. Deductible shall be applied in full to each Dry Dock or Calsson and shall not be pro rated over each Section and property on shore pertaining thereto.

2. In respect of Dry Docks consisting of more than one Section:

The Equipment forming a part of the Floating Dry Docks and Calssons situated on shore and not on the Docks (consisting of switchboards, transformers, electrical equipment, panels and all other similar equipment) and each Section of the Dry Docks shall be separately valued and separately insured for the amounts stated above.

In respect of Dry Docks and Calssons consisting of one Unit or Section:

It is understood and agreed that loss or damage to property on shore forming a part of the Dry Docks or Calssons shall not exceed 10% of the total value stated herein (Column 4) on each respective Dry Dock or Calsson and when so applying the same amount shall cease to cover on the floating Unit or Section.

Definitive Numbers of the Syndicates and Amount, Percentage or Proportion of the Total Amount insured shared between the Members of those Syndicates.

The percentages signed hereon are percentages of the full amount (i.e. \$10,000,000) and not of the policy amount.

PERCENT	SYNDICATE	UNDERWRITER'S REFERENCE
1.543	542	52504
1.203	542	52504
1.107	542	52504
1.107	542	52504
1.107	542	52504
.411	542	52504
3.280	542	52504
.328	542	52504
.443	542	52504
2.053	542	52504
2.053	542	52504
.411	542	52504
.606	542	52504
.450	542	52504
1.725	542	52504
.345	542	52504
.345	542	52504
0.027	542	52504
1.232	542	52504
1.786	542	52504
.267	542	52504
.486	542	52504
.246	542	52504
4.107	542	52504
.821	542	52504


PERCENT	SYNDICATE	UNDERWRITER'S REFERENCE
1.203	542	52504
1.027	542	52504
.821	542	52504
.210	542	52504
1.232	542	52504
.852	542	52504
.085	542	52504
.145	542	52504
1.027	542	52504
.821	542	52504
.821	542	52504
.616	542	52504
.411	542	52504
.205	542	52504
.411	542	52504
.411	542	52504
.616	542	52504
.210	542	52504
.205	542	52504
.103	542	52504
.411	542	52504

PERCENT	SYNDICATE	UNDERWRITER'S REFERENCE
.082	719	52504
.124	719	52504



## EXHIBIT "E" TO STIPULATION OF FACTS—1a

(Page 4)

(See opposite) 

.411  
.606  
.460  
1.725  
.345  
.345  
0.027  
1.232  
1.786  
.267  
.486  
.246  
4.107  
.821

4123 5  
0843 5  
2634 5 55  
4504 5 55  
9024 5 55  
9994 5 55  
31657 P  
9957 5 55  
711H/T46 / 5 55  
713H/T46 / 5 55  
2747 5 55  
2707 5 55  
41856/PW 11  
7075 5 55

.821  
.616  
.411  
.205  
.411  
.411  
.616  
.616  
.205  
.103  
.411  
5217 5 55 00 1  
4777 5 55  
3097 5 55  
7427 5 55 10 00  
2647 5 55  
5547 5 55  
2877 5 55 1 10  
2227 5 55  
5257 5 55  
5127 5 55  
4737 5 55

AMOUNT PERCENTAGE ON PROPORTION

.082  
.184  
.739  
.404  
1.027  
.205  
.205  
1.027  
1.540  
.513  
.821  
1.832  
1.232  
.205  
.821  
.821  
1.027  
.205  
.822  
.205  
1.232  
.616  
.616  
.821  
1.027  
.821

PROPERTY NO. LP.S.O. SLIP NO. LP.S.O. DATE  
52504 6 7/56  
SYNDICATE UNDERWRITER'S AFFIDAVIT  
7195 5 55  
7245 5 55  
5327 5  
5337 5  
2135062 4 5  
2065062 4 5  
2035062 4 5  
897 5 T/17  
7644 5 55 P K  
3414 5 55 P K  
5907 5 55  
165RENL  
10H7 5  
1017 5  
8684 5  
8557 5 DK 950  
43H7 5 55  
3547 5 55  
5357 5  
5367 5  
123  
247  
8177 5  
2168LG 1706  
4H30/0 14  
220K/5 5

RATES as per schedule attached.

Plus .5% Strikers etc. (Broad Form).

Nos. 15 and 20. To pay Additional Premium pro rata .775% from time locks are placed in actual operation.

RENEWALS each 15 days cancelling.

Rate:	<u>2.00% plus .05%</u>	<u>1.80% plus .05%</u>	<u>1.25% plus .05%</u>	<u>1.55% plus .05%</u>
Return:	7.003125% nett	6.24375% nett	4.3075% nett	5.40% nett.

To return 3.70075% nett Nos. 1, 2 and 10 and 3.0375% nett on other main circle locks for each consecutive 15 days unemployed - and arrival.

To return 3.20025% nett for each consecutive 15 days unemployed as far as concerns lock No. 2, Houston, - and arrival.

This insurance also covers damage to or destruction of the property insured directly caused by strikers, locked-out workmen or persons taking part in labor disturbances or riots or civil commotions or caused by vandalism, sabotage or malicious mischief but excluding civil war, revolution, rebellion or insurrection, or civil strife arising therefrom, and warranted free from any claim for delay, detention or loss of use.

Notwithstanding the exclusions in the above clause in the

EXHIBIT "B" TO STIPULATION OF FACTS—1a

(Page 3)

(See opposite) 

Rate each 15 days cancelling.

Rate:	<u>2.00 plus .05%</u>	<u>1.80 plus .05%</u>	<u>1.25 plus .05%</u>	<u>1.55 plus .05%</u>
Return:	7.003125¢ nett	6.24375¢ nett	4.3075¢ nett	5.40¢ nett.

To return 3.70075¢ nett Nos. 1, 2 and 10 and 3.0375¢ nett on other main circle locks for each consecutive 15 days unemployed - and arrival.

To return 3.20025¢ nett for each consecutive 15 days unemployed as far as concerns lock No. 2, Houston, - and arrival.

This insurance also covers damage to or destruction of the property insured directly caused by strikers, locked-out workmen or persons taking part in labor disturbances or riots or civil commotions or caused by vandalism, sabotage or malicious mischief, but excluding civil war, revolution, rebellion or insurrection, or civil strife arising therefrom, and warranted free from any claim for delay, detention or loss of use.

Notwithstanding the exclusions in the above clause in the within policy "vandalism", "sabotage" and "malicious mischief", as used herein, shall be construed to include wilful or malicious physical injury to or destruction of the described property caused by acts committed by an agent of any Government, party or faction engaged in war, hostilities or other warlike operations provided such agent is acting secretly and not in connection with any operations of military or naval armed forces in the country where the described property is situated.

**ASSURED:**

**TODD SHIPYARDS CORPORATION** and/or **TODD ATLANTIC SHIPYARDS CORPORATION**  
and/or **Affiliated and/or Associated Corporations and/or Companies** of any of the above,  
as their respective interests may appear.

Losses, if any, payable to **TODD SHIPYARDS CORPORATION**, or order.

The Sectional Floating Dry Docks and/or Caissons insured hereunder and the amounts insured thereon and the valuations thereof (each) for all purposes of this insurance are declared and agreed to be as below set forth, each to be considered as if separately insured.

(1)	(2)	(3)	(4)	DISTRIBUTION OF TOTAL VALUATION (4)	
ITEM	Rate	NUMBER OF SECTIONS OR UNITS	TOTAL VALUATION	VALUE OF DOCK EQUIPMENT IF ANY OWNED BY ASSURED AND SITUATED ON SHORE SUCH AS SWITCHBOARDS, TRANSFORMERS, ELECTRICAL EQUIPMENT, PANELS, ETC.	VALUE OF EACH FLOATING UNIT OR SECTION
<b>NEW YORK HARBOR (Brooklyn Division)</b>					
1	2.025%	Caisson for Graving Dock No. 1	1 Unit	\$ 150,000.	Not exceeding 10% of Total Valuation.
2	2.025%	Caisson for Graving Dock No. 2	1 Unit	50,000.	"
3	1.80%	Dry Dock No. 3	5 Sections	650,000.	" \$130,000, less proportionate share of value of equipment ashore, if any.
4	1.80%	Dry Dock No. 4	6 Sections	1,000,000.	" \$166,667, less proportionate share of value of equipment ashore, if any.
5	1.80%	Dry Dock No. 6	5 Sections	800,000.	" \$160,000, less proportionate share of value of equipment ashore, if any.
<b>NEW YORK HARBOR (Hoboken Division)</b>					
6	1.80%	Dry Dock No. 1	1 Unit (Box Dock)	100,000.	"
7	1.80%	Dry Dock No. 2	1 Unit (Box Dock)	100,000.	"
8	1.80%	Dry Dock No. 3	1 Unit (Box Dock)	250,000.	"
9	1.80%	Dry Dock No. 4	5 Sections	750,000.	" \$150,000, less proportionate share of value of equipment ashore, if any.
10	1.80%	Dry Dock No. 5	1 Unit (Box Dock)	75,000.	"



AS PER SCHEDULE ATTACHED

FOR ACCOUNT OF WHOM IT MAY CONCERN. LOSS, IF ANY, PAYABLE IN FUNDS CURRENT IN UNITED STATES OF AMERICA, TO

TODD SHIPYARD'S CORPORATION

OR ORDER

DO MAKE INSURANCE AND CAUSE TO BE INSURED

AT AND FROM THE 6th DAY OF June 19 26 AT NOON New York Standard TIME

UNTIL THE 6th DAY OF June 19 27 AT NOON New York Standard TIME

FOR as per schedule attached dollars (\$.....)

As employment may offer, in port or at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places and on all occasions, services and trades whatsoever and wheresoever, under power or sail, upon the Body, Tackle, Apparel, Machinery, Pumps, Equipment, Cradles, Power House, Hauling Machinery, Boilers, &c., Ordnance, Munitions, Stores, Artillery, Boat and other Furniture or equipment of whatever nature and everything connected therewith of and in the good

as per schedule attached.

or by whatsoever other name or names the said dock is or shall be named or called, beginning the adventure upon the said dock, &c., as above, and shall so continue and endure during the period as aforesaid. Should the above dock at the expiration of this policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters be held covered at a pro rata monthly premium to her port of destination, and it shall be lawful for the said dock, &c., to proceed and sail to and touch and stay at any Ports or Places whatsoever and wheresoever without prejudice to this insurance. The said dock, &c., for so much as concerns the Assured, by agreement between the Assured and Assurers in this policy, is and shall be valued for all purposes of this insurance at \$..... as per schedule attached

3 Privilege to use dry dock sections separately or collectively without prejudice to this insurance.

4 TOUCHING the adventures and perils which we, the said assurers, are contented to bear and take upon us, they are of the Seas, Rivers, Lakes, Harbors, Fire, Pirates, Rovers, Assaulting Thieves, Jettisons, Explosions, Riots, and all other perils, losses, and misfortunes of whatsoever nature arising either on shore or otherwise that have or shall come to the hurt, detriment, or damage of said dock, &c., or any part thereof. And in the case of any loss or misfortune it shall be lawful for the assured, their factors, servants and assigns, to sue, labor and travel for, in, and about the defense, safeguard and recovery of the said dock, &c., or any part thereof, without prejudice to this insurance; to the charges whereof the said insurance company will contribute according to the Rate and Quantity of the sum herein insured. And it is expressly declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment. Having been paid the consideration for this insurance, by the

Assured or their assigns at and after the rate of as attached per cent.

5 TO RETURN as attached per cent net for every 15 days of unexpired time, if this insurance be cancelled, but there shall be no cancellation or return of premium in case of total loss of the property from any cause whatsoever.

To pay averages in full irrespective of percentage and repairs to be paid without deduction of new for old.

WITH LEAVE to sail with or without pilots, be towed, and to assist vessels and/or craft in all situations and to any extent to render salvage services, and to go on trial trips. Including risks of drydocking, undocking or changing docks or moving in harbours and going on and/or off slipway, gridiron or graving dock or pontoons as often as may be required and to adjust compasses.

General Average, Salvage and Special Charges payable as provided in the contract of affreightment, or failing such provisions, or there be no contract of affreightment, payable in accordance with the Laws and Usages of the Port of New York or San Francisco. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid in accordance with same.

When the contributory value of the dock is greater than the valuation herein the liability of these Underwriters for General Average contribution (except in respect to amount made good to the dock) or Salvage shall not exceed that proportion of the total contribution due from the dock that the amount insured hereunder bears to the contributory value; and if because of damage for which these Underwriters are liable as Particular Average the value of the dock has been reduced for the purpose of contribution, the amount of the Particular Average claim under this Policy shall be deducted from the amount insured hereunder and these Underwriters shall be liable only for the proportion which such net amount bears to the contributory value.

Assured or their assigns at and after the rate of as attached per cent.

8 **TO RETURN** as attached per cent not for every 15 days of unexpired time, if this insurance be cancelled, but there shall be no cancellation or return of premium in case of total loss of the property from any cause whatsoever.

To pay averages in full irrespective of percentage and repairs to be paid without deduction of new for old.

**WITH LEAVE** to sail with or without pilots, be towed, and to assist vessels and/or craft in all situations and to any extent to render salvage services, and to go on trial trips. Including risks of drydocking, undocking or changing docks or moving in harbours and going on and/or off slipway, gridiron or graving dock or pontoons as often as may be required and to adjust compasses.

General Average, Salvage and Special Charges payable as provided in the contract of affreightment, or failing such provisions, or there be no contract of affreightment, payable in accordance with the Laws and Usages of the Port of New York or San Francisco. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid in accordance with same.

When the contributory value of the dock is greater than the valuation herein the liability of these Underwriters for General Average contribution (except in respect to amount made good to the dock) or Salvage shall not exceed that proportion of the total contribution due from the dock that the amount insured hereunder bears to the contributory value; and if because of damage for which these Underwriters are liable as Particular Average the value of the dock has been reduced for the purpose of contribution, the amount of the Particular Average claim under this Policy shall be deducted from the amount insured hereunder and these Underwriters shall be liable only for the proportion which such net amount bears to the contributory value.

This insurance also specially to cover cost of repairs, and/or loss of or damage to the property hereby insured, directly caused by accidents in loading, discharging or handling cargo or by any object whatsoever coming in contact therewith, or caused through negligence and/or error of judgment of Master, Mariners, Engineers, or other servants or employees of the Owners and/or Charterers and/or Operators and/or Lessees. Pilots, Servants, or Employees of Port, Harbour or Dock Authorities, Stevedores, Labourers, Tradesmen or other Persons in, on or about the Dock, or through contact with aircraft, or objects dropping therefrom, or through explosions, howsoever or wheresoever occurring, bursting of boilers, breakage of machinery or shafts, or through any latent defect in the Machinery or Hull (excluding, however, the cost and expense of repairing or renewing the defective part), causing loss or injury to the property hereby insured, provided such loss or damage has not resulted from want of due diligence by the owners of the dock, or any of them, or by the Manager, and to cover all risks incidental to Navigation, or in graving docks, Master, Mates, Engineers, Pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the property. Seaworthiness admitted.

~~THIS POLICY ALSO COVERS ALL LOSS AND/OR DAMAGE AND/OR EXPENSE CAUSED TO THE DOCK HEREBY INSURED BY ANY VESSEL AND/OR CRAFT AND/OR STRUCTURE ENTERING AND/OR IN AND/OR LEAVING THE DOCK.~~

11 Including loss or damage directly or indirectly caused by earthquake, volcanic eruption, or tidal waves.

12 This policy also covers all loss and/or damage and/or expense caused to the dock hereby insured by any vessel and/or craft and/or structure entering and/or in and/or leaving the dock.

14 **IN THE EVENT** of this policy beginning or ending while the dock is in course of a voyage, underwriters agree to pay their proportion of loss or damage sustained while the policy is in force, provided the loss or damage sustained on the entire voyage would have been recoverable, if this policy had covered such voyage in its entirety.

15 No recovery for a Constructive Total Loss shall be had hereunder, unless the expense of recovering and repairing the dock shall exceed the insured value.

16 **IN ASCERTAINING** whether the dock is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the dock or wreck shall be taken into account.

17 **IN NO CASE** shall the insurers be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this policy.

18 **IT IS AGREED** that any change of interest in the property hereby insured, shall not affect the validity of this policy.

19 **HELD COVERED** in case of any breach of warranty as to trade, locality or description provided notice be given, and any additional premium required be agreed as soon as practicable after receipt of advices.

20 Warranted free of liability for damage done to vessels, craft and/or structures or their cargoes or their freight whilst going on, whilst on and/or whilst going off the dock insured hereunder.

21 It is agreed to substitute the words "Marine Railway" for the word "Dock", where or whenever required.

### FULL COLLISION AND SISTER SHIP COLLISION CLAUSE

22 And it is further agreed that if the Dock hereby insured shall come into collision with any Ship or Vessel and the Assured or the Charterers or Operators or Lessees in consequence thereof or the Surety for any or all of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, we, the Underwriters, will pay the Assured or Charterers or Operators or Lessees such proportion of such sum or sums so paid as our respective subscriptions hereto bear to the value of the Dock hereby insured, provided always that our liability in respect of any one such collision shall not exceed our proportionate part of the value of the Dock hereby insured. And in cases where the liability of the Dock has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the dock, etc., we will also pay a like proportion of the costs which the Assured or Charterers or Operators or Lessees shall thereby incur, or be compelled to pay; but when both Dock and Vessel are to blame, then, unless the liability of the Owners or Charterers or Operators or Lessees of one or both of such Dock and Vessel become limited by law, claims under the Collision Clause shall be settled on the principle of Cross Liabilities as if the Owners or Charterers or Operators or Lessees of each had been compelled to pay to the Owners or Charterers or Operators or Lessees of the other such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to Assured or Charterers or Operators or Lessees in consequence of such collision; and it is further agreed that the principles involved in this clause shall apply to the case where both Dock and Vessel are the property, in part or in whole, of the same Owners or Charterers or Operators or Lessees, all questions of responsibility and amount of liability as between the two being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the Managing Owners or Charterers or Operators or Lessees of both and one to be appointed by the majority (in amount) of Underwriters interested; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference, and the decision of such single, or of any two of such three Arbitrators, appointed as above to be final and binding. **PROVIDED ALWAYS THAT THIS CLAUSE SHALL ALSO EXTEND** to any sum which the Assured or Charterers or Operators or Lessees may become liable to pay or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages and similar structures, consequent on such collision, or in respect of the Insured Dock **BUT EXCLUDING LIABILITY FOR LOSS OF LIFE OR PERSONAL INJURY**.



61 It is agreed to substitute the words "Marine Railway" for the word "Dock", where or whenever required.

## FULL COLLISION AND SISTER SHIP COLLISION CLAUSE

62 And it is further agreed that if the Dock hereby insured shall come into collision with any Ship or Vessel and the Assured or the Charterers or Operators or Lessees in consequence thereof or the Surety for any or all of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, we, the Underwriters, will pay the Assured or Charterers or Operators or Lessees such proportion of such sum or sums so paid as our respective subscriptions hereto bear to the value of the Dock hereby insured, provided always that our liability in respect of any one such collision shall not exceed our proportionate part of the value of the Dock hereby insured. And in cases where the liability of the Dock has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the dock, etc., we will also pay a like proportion of the costs which the Assured or Charterers or Operators or Lessees shall thereby incur, or be compelled to pay; but when both Dock and Vessel are to blame, then, unless the liability of the Owners or Charterers or Operators or Lessees of one or both of such Dock and Vessel become limited by law, claims under the Collision Clause shall be settled on the principle of Cross Liabilities as if the Owners or Charterers or Operators or Lessees of each had been compelled to pay to the Owners or Charterers or Operators or Lessees of the other such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to Assured or Charterers or Operators or Lessees in consequence of such collision; and it is further agreed that the principles involved in this clause shall apply to the case where both Dock and Vessel are the property, in part or in whole, of the same Owners or Charterers or Operators or Lessees, all questions of responsibility and amount of liability as between the two being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the Managing Owners or Charterers or Operators or Lessees of both and one to be appointed by the majority (in amount) of Underwriters interested; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference, and the decision of such single, or of any two of such three Arbitrators, appointed as above to be final and binding. PROVIDED ALWAYS THAT THIS CLAUSE SHALL ALSO EXTEND to any sum which the Assured or Charterers or Operators or Lessees may become liable to pay or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages and similar structures, consequent on such collision, or in respect of the Insured Dock BUT EXCLUDING LIABILITY FOR LOSS OF LIFE OR PERSONAL INJURY.

63 And it is further agreed that in the event of salvage, towage or other assistance being rendered to the Dock hereby insured by any Vessel belonging in part or in whole to the same Owners or Charterers or Operators or Lessees, the value of such services (without regard to the common ownership or control of the Vessel) shall be ascertained by arbitration in the manner above provided for under the Collision Clause, and the amount so awarded so far as applicable to the interest hereby insured shall constitute a charge under this Policy.

## PROTECTION AND INDEMNITY CLAUSE

64 AND WE FURTHER AGREE that if the Assured and/or charterers and/or operators and/or lessees shall become liable to pay and shall pay any sum or sums in respect of any responsibility, claim, demand, damages, and/or expenses or shall incur any other loss arising from or occasioned by any of the following matters or things during the currency of this policy in respect of the dock hereby insured, that is to say:

65 Loss or damage in respect of any other ship or boat or in respect of any goods, merchandise, freight or other things or interests whatsoever on board such other ship or boat, caused proximately or otherwise by the dock insured in so far as the same is not covered by the Collision Clause herein set forth.

66 Loss or damage to any goods, merchandise, freight or other things or interests whatsoever, other than as aforesaid, whether on board the said dock or not which may arise from any cause whatever.

67 Loss or damage to any harbor, dock, graving or otherwise, slipway, way, gridiron, pontoon, pier, quay, jetty, stage, buoy, telegraph cable, or other fixed or movable thing whatsoever or to any goods or property in or on or about the same, howsoever caused.

68 Any attempted or actual raising, removal or destruction of the wreck of the said dock or the cargo thereof, or any neglect or failure to raise, remove or destroy the same.

69 Any sum or sums for which the Assured and/or charterers and/or operators and/or lessees may become liable or incur from causes not hereinbefore specified, but which are or have heretofore been absolutely or conditionally recoverable from or undertaken by British Protection and Indemnity Clubs, but excluding loss of life or personal injury.

70 We will pay the Assured and/or charterers and/or operators and/or lessees such proportion of such sum or sums so paid, or which may be required to indemnify the Assured and/or charterers and/or operators and/or lessees for such loss as our respective subscriptions bear to the policy value of the dock hereby insured, and in case the liability of the Assured and/or charterers and/or operators and/or lessees has been contested, with the consent in writing of a majority of the Underwriters on the dock hereby insured (in amount), we will also pay a like proportion of the costs which the Assured and/or charterers and/or operators and/or lessees shall thereby incur or be compelled to pay.

71 This insurance also to pay the expenses, after deduction of the proceeds of the salvage, not recoverable under Clause 28, of the removal of the wreck of the insured dock from any place owned, leased or occupied by the Assured. Underwriters' Liability under this clause is subject to the limitations in amount provided in Clause 30. The provisions of that clause regarding the payment of costs shall apply also hereto.

72 It is further agreed that in all cases of common ownership of dock or other property the matter shall be dealt with in accordance with the principles laid down in the sistership clauses incorporated in the collision clause.

## FREE OF CAPTURE AND SEIZURE CLAUSE (WAR RISK EXCLUSION)

73 Unless physically deleted by the Underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provision of the Policy:

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detention or the consequences thereof or of any attempt thereto, or any taking of the Dock, by regulation or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire or explosion unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power.

Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy. If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

## NON PAYMENT OF PREMIUM CLAUSE (applicable to insurance placed in London or outside U. S. A.)

74 The Assured shall be directly liable to the Assurer for all premiums under this policy. If payment of premium is not made by the Assured within 10 days after attachment of the insurance or, in the event the Assurer shall have agreed to accept deferred payments, if any payment of premium is

sum or sums in respect of any responsibility, claim, demand, damages, and/or expenses or shall incur any other loss arising from or occasioned by any of the following matters or things during the currency of this policy in respect of the dock hereby insured, that is to say:

Loss or damage in respect of any other ship or boat or in respect of any goods, merchandise, freight or other things or interests whatsoever on board such other ship or boat, caused proximately or otherwise by the dock insured in so far as the same is not covered by the Collision Clause herein set forth.

Loss or damage to any goods, merchandise, freight or other things or interests whatsoever, other than as aforesaid, whether on board the said dock or not which may arise from any cause whatever.

Loss or damage to any harbor, dock, graving or otherwise, slipway, way, gridiron, pontoon, pier, quay, jetty, stage, buoy, telegraph cable, or other fixed or movable thing whatsoever or to any goods or property in or on or about the same, howsoever caused.

Any attempted or actual raising, removal or destruction of the wreck of the said dock or the cargo thereof, or any neglect or failure to raise, remove or destroy the same.

Any sum or sums for which the Assured and/or charterers and/or operators and/or lessees may become liable or incur from causes not hereinbefore specified, but which are or have heretofore been absolutely or conditionally recoverable from or undertaken by British Protection and Indemnity Clubs, but excluding loss of life or personal injury.

We will pay the Assured and/or charterers and/or operators and/or lessees such proportion of such sum or sums so paid, or which may be required to indemnify the Assured and/or charterers and/or operators and/or lessees for such loss as our respective subscriptions bear to the policy value of the dock hereby insured, and in case the liability of the Assured and/or charterers and/or operators and/or lessees has been contested, with the consent in writing of a majority of the Underwriters on the dock hereby insured (in amount), we will also pay a like proportion of the costs which the Assured and/or charterers and/or operators and/or lessees shall thereby incur or be compelled to pay.

This insurance also to pay the expenses, after deduction of the proceeds of the salvage, not recoverable under Clause 28, of the removal of the wreck of the insured dock from any place owned, leased or occupied by the Assured. Underwriters' Liability under this clause is subject to the limitations in amount provided in Clause 30. The provisions of that clause regarding the payment of costs shall apply also hereto.

It is further agreed that in all cases of common ownership of dock or other property the matter shall be dealt with in accordance with the principles laid down in the sisterhip clauses incorporated in the collision clause.

### FREE OF CAPTURE AND SEIZURE CLAUSE (WAR RISK EXCLUSION)

Unless physically deleted by the Underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provision of the Policy:

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment or the consequences thereof or of any attempt thereto, or any taking of the Dock, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire or explosion unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power.

Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy. If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

### NON PAYMENT OF PREMIUM CLAUSE (applicable to insurance placed in London or outside U. S. A.)

The Assured shall be directly liable to the Assurer for all premiums under this policy. If payment of premium is not made by the Assured within 10 days after attachment of the insurance or, in the event the Assurers shall have agreed to accept deferred payments, if any, payment of premium is not made on the day agreed, this policy may be cancelled by the Assurers giving to the Assured named herein five days' notice of such cancellation. A written and/or telegraphic notice by or through the brokers, or their American Correspondents, who negotiated the insurance, to said Assured at his last known address shall constitute a complete notice as required under this clause. Such cancellation shall be without prejudice to premiums earned and due for the period the policy is in force.

### NON PAYMENT OF PREMIUM CLAUSE (applicable to insurance placed in U. S. A.)

The Assured shall be directly liable to the Assurer for all premiums under this policy. If payment of premium is not made by the Assured within thirty (30) days after attachment of the insurance, or, in the event the Assurers shall have agreed to accept deferred payments, if any payment of any premium is not made on the day agreed, this policy may be cancelled at any time thereafter by the Assurer giving to the Assured named herein, and to third party payee or payees (if any) named in the policy, five (5) days notice of such cancellation.

Such notice may be given either by the Assurer itself or in its behalf by the Board of Marine Underwriters of San Francisco, Incorporated. Such cancellation shall be without prejudice to the premiums earned and due for the period the policy was in force.


The terms and conditions of this form are to be regarded as substituted for those of policy form to which it is attached, the latter being hereby waived, except provisions required by law to be inserted in the Policy.

Attached to Policy No. M.L. 9350 of the LLOYDS

Dated 14th June 1956

EXHIBIT "B" TO STIPULATION OF FACTS—1a

(Page 5)

(See opposite) 



It is understood that the Assured may enter into contracts with the United States Government or departments or agencies thereof which would include a provision substantially as follows:

"Vessel will proceed to the contractor's plant under her own power or in tow of Coast Guard vessel. Contractor shall provide all necessary towage, handling etc. to place the vessel at his wharf. Contractor shall also provide all necessary towage, handling etc. to remove vessel from yard. The Government shall not be responsible for damage done to contractor's property and/or other vessels in contractor's yard, etc. while vessel is under tow of tugs provided by contractor or while vessel is being moved by contractor about the yard".

It is understood and agreed that the acceptance by the Assured of any contracts which contain said provision shall not prejudice this insurance and these Assurers waive subrogation rights against the United States Government or any departments or agencies thereof.

Where in accordance with established local practice the Assured or the Charterer enters into towage contracts under which the Assured or the Charterer assumes liability for any damages resulting from collision of the vessel insured with another ship or vessel, including the towing vessel, and agrees to indemnify the towboat and/or her owners against loss or liability for any such damage, it is agreed that amounts paid by the Assured or Charterer pursuant to such agreement, in respect of such damage caused by collision between the vessel insured and any other ship or vessel, shall be deemed payments 'by way of damages to any other person or persons' within the meaning of the Collision Clause in this policy to the extent that such payments would have been covered under the said collision clause if the insured vessel had been responsible for the damage in the absence of any agreement.

The Assured shall not be prejudiced by reason of any agreement limiting or exempting the liability of tugs, and/or tow-boats and/or their owners when the Assured is compelled to accept such contracts.

collision between the vessel insured and any other ship or vessel, shall be deemed payments 'by way of damages to any other person or persons' within the meaning of the Collision Clause in this policy to the extent that such payments would have been covered under the said collision clause if the insured vessel had been responsible for the damage in the absence of any agreement.

The Assured shall not be prejudiced by reason of any agreement limiting or exempting the liability of tugs, and/or tow-boats and/or their owners when the Assured is compelled to accept such contracts.

### SERVICE OF SUIT (U.S.A.)

The place of physical and actual issue and delivery of this policy is the City of London, but nevertheless as between the Assured and the Assurers the place of suit hereon shall be deemed the United States of America, and any suit hereon may be brought against these Assurers in any Court of competent jurisdiction within the United States. The summons and other legal processes may be served on these Assurers by and in behalf of the Assured by mailing a copy thereof by United States registered mail addressed to Russel T. Mount, William B. Mendes, or Frank A. Bull, all of the law firm of Mendes and Mount, 27 William Street, New York City, New York, each of whom these Assurers hereby authorise to accept by and in their behalf such summons and other legal processes against these Assurers in any Court of competent jurisdiction within the United States. The mailing, as herein provided, of such summons or other legal process shall be deemed personal service and accepted by these Assurers as such, and shall be legal and binding upon these Assurers for all the purposes of the suit. Final judgment against these Assurers in any such suit shall be conclusive; and it may be enforced in other jurisdictions, including Great Britain by suit on the judgment, a certified or exemplified copy of which shall be conclusive evidence of the fact and of the amount of this indebtedness. The right of the Assured to bring suit as provided herein shall be limited to a suit brought in its own name and for its own account. For the purpose of suit as herein provided, the word "Assured" includes any mortgagee under a ship mortgage and any person succeeding to the rights of any such mortgagee.

IF AND WHEN A ...  
**SERVICE OF SUIT CLAUSE (NEW YORK) (MARINE)**

*(Approved by Lloyd's Underwriters' Association.)*

Underwriters hereon hereby designate the Superintendent of Insurance of the State of New York or his successor in office their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the (re)insured or any beneficiary hereunder arising out of this contract of (re)insurance.

Printed at Lloyd's, London, England.

11/8/49

It is understood and agreed that the F. C. & S. Clause in the attached Form is hereby deleted and the following Clause :—

Unless physically deleted by the Underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provision of the Policy :

**F. C. & S. CLAUSE.**

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise ; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), but the foregoing shall not exclude collision, explosion or contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power, and for the purpose of this warranty " power " includes any authority maintaining naval, military or air forces in association with a power ; also warranted free, whether in time of peace or war, from all loss, damage or expense caused by any weapon of war employing atomic fission or radioactive force. Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.


If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

is substituted therefor.

1104-17.11.55.

## EXHIBIT "B" TO STIPULATION OF FACTS—1a

(Page 6)

(See opposite) 

In all communications please quote  
the following reference

542

...735..

LLOYD'S,



LONDON.

*Counted to the  
New York*

London

17th June 1950.

100.000.000.

100.000.000.

0

100.000.000.

100.000.000. part of 100.000.000. of  
Total Valuation as attached (was attached)

#### IMPORTANT

Before presenting this Policy for payment of  
any claim or return of premium, it is essential  
that it shall bear the signature of the firm or  
individual in whose name it is drawn.


(In the event of accident whereby loss or damage may  
result in a claim under this Policy, the settlement  
will be much facilitated if immediate notice be given  
to the nearest Lloyd's Agent.)





EXHIBIT "B" TO STIPULATION OF FACTS—2a

(Page 1)

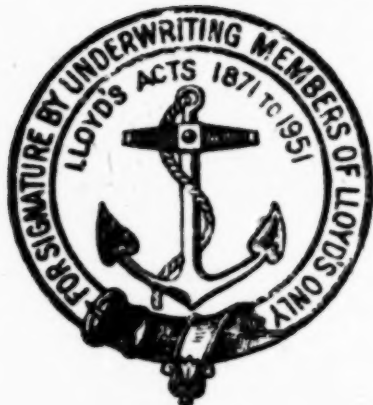
(See opposite) 

50012 \* 16 SEP 1959

(No.

11.0.31,3

No Policy or other Contract dated on or after 1st Jan., 1924, will be recognised by the Committee of Lloyd's as entitling the holder to the benefit of the Funds and/or Guaranties lodged by the Underwriters of the Policy or Contract as security for their liabilities unless it bears at foot the Seal of Lloyd's Policy Signing Office.



Any person not an Underwriting Member of Lloyd's subscribing this Policy, or any person uttering the same if so subscribed, will be liable to be proceeded against under Lloyd's Acts.

S.G.

69, part of 100, of  
US\$3,000,000

Printed at Lloyd's, London, England.

24.5.59

**Be it known that** TODD SHIPYARDS CORPORATION AND THE UNITED STATES OF AMERICA (Department of the Navy)

as well in their own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in part or in all, doth make Assurance, and cause themselves and them and every of them, to be insured, lost or not lost, at and from

and for and during the space of TWELVE CALENDAR MONTHS

Commencing Noon 13th September 1959

and ending Noon 13th September 1960

Beginning and ending with Eastern Standard Time.

Whilst at Galveston, Texas or held covered at a premium to be arranged.

upon any kind of Goods and Merchandises, and also the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel called the

UNITED STATES NAVY THREE SECTION STEEL DRYDOCK AFDM No.1.

whereof is Master, under God, for this present Voyage,

or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the same Ship, or the Master thereof, is or shall be named or called, beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the said Ship as above

upon the said Ship, &c., as above and shall so continue and endure during her Abode there, upon the said Ship, &c.; and further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods and Merchandises whatsoever, shall be arrived at as above

upon the said Ship, &c., until she hath moored at Anchor ~~at any place~~ in good Safety, and upon the Goods and Merchandises until the same be there discharged and safely landed; and it shall be lawful for the said Ship, &c., in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever and wheresoever for all purposes

without Prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured by Agreement between the Assured and Assurers in this Policy, are and shall be valued at **HULL AND/OR MATERIALS and everything connected therewith**

Valued US\$3,000,000

Subject to the Todd Dry Dock Form as attached, including Strikes etc.  
(Broad Form) as attached.

Including Waiver of Subrogation against United States Government Clause as attached.

Including Towage Contracts Clause as attached.



*without prejudice for all purposes*

without Prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured by Agreement between the Assured and Assurers in this Policy, are and shall be valued at **HULL AND/OR MATERIALS and everything connected therewith**

Valued US\$3,000,000

Subject to the Todd Dry Dock Form as attached, including Strikes etc.  
(Broad Form) as attached.

Including Waiver of Subrogation against United States Government Clause  
as attached.

Including Towage Contracts Clause as attached.

Subject to the Service of Suit Clauses as attached.

**Touching** the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Goods and Merchandises and Ship, &c., or any Part thereof; and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants and Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard and Recovery of the said Goods and Merchandises and Ship, &c., or any part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his Sum herein assured. And it is especially declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London.

*Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or warlike operations, whether there be a declaration of war or not; but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power.*

*Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.*

And so we, the Assurers, are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured

at and after the Rate of **.625 per cent including strikes, riots and civil commotions**

**IN WITNESS** whereof we, the Assurers, have subscribed our Names and Sums assured in **LONDON, 7th September 1959** as hereinafter appears.

N.B. Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are warranted free from Average under **Five Pounds per Cent.**; and all other Goods, also the Ship and Freight, are warranted free from Average under **Three Pounds per Cent.**, unless general, or the Ship be stranded

**How Know We**, that We the Assurers, members of the Syndicate(s) whose definitive Number(s) in the attached list are set out in the Table overleaf, or attached overleaf, hereby bind Ourselves, each for his own part and not one for another, and in respect

**Touching** the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Goods and Merchandises and Ship, &c., or any Part thereof; and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants and Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard and Recovery of the said Goods and Merchandises and Ship, &c., or any part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his Sum herein assured. And it is especially declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London.

*Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or warlike operations, whether there be a declaration of war or not; but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power.*

*Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.*

And so we, the Assurers, are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured

at and after the Rate of .625 per cent including strikes, riots and civil commotions

IN WITNESS whereof we, the Assurers, have subscribed our Names and Sums assured in LONDON, 7th September 1959 as hereinafter appears.

N.B. - Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are warranted free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are warranted free from Average under ~~DELETED~~ Three Pounds per Cent., unless general, or the Ship be stranded

**Now Know Ye**, that We the Assurers, members of the Syndicate(s) whose definitive Number(s) in the attached list are set out in the Table overleaf, or attached overleaf, hereby bind Ourselves, each for his own part and not one for another, and in respect of his due proportion only, to pay or make good to the Assured all such Loss and/or Damage which he or they may sustain by any one or more of the aforesaid perils, and so that the due proportion for which each of Us the Assurers is liable shall be ascertained by reference to his proportion as ascertained according to the said List, of the Amount, Percentage or Proportion of the total Sum assured which is in the said Table set opposite the definitive Number of the Syndicate of which such Assurer is a member.

IN WITNESS whereof the Manager of Lloyd's Policy Signing Office has subscribed his Name on behalf of each of Us.

LLOYD'S POLICY SIGNING OFFICE,



MANAGER.





the property insured shall be considered as a waiver or acceptance of abandonment. Having been paid the consideration for this insurance, by the Assured or their assigns at and after the rate of 6.25 per cent. including pro. r. c.

5 TO RETURN 2.209275 per cent net for every 15 days of unexpired time, if this insurance be cancelled, but there shall be no cancellation or return of premium in case of total loss of the property from any cause whatsoever.

6 To pay averages in full irrespective of percentage and repairs to be paid without deduction of new for old.

7 WITH LEAVE to sail with or without pilots, be towed, and to assist vessels and/or craft in all situations and to any extent to render salvage services, and to go on trial trips. Including risks of drydocking, undocking or changing docks or moving in harbours and going on and/or off slipway, gridiron or graving dock or pontoons as often as may be required and to adjust compasses.

8 General Average, Salvage and Special Charges payable as provided in the contract of affreightment, or failing such provisions, or there be no contract of affreightment, payable in accordance with the Laws and Usages of the Port of New York or San Francisco. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid in accordance with same.

9 When the contributory value of the dock is greater than the valuation herein the liability of these Underwriters for General Average contribution (except in respect to amount made good to the dock) or Salvage shall not exceed that proportion of the total contribution due from the dock that the amount insured hereunder bears to the contributory value; and if because of damage for which these Underwriters are liable as Particular Average the value of the dock has been reduced for the purpose of contribution, the amount of the Particular Average claim under this Policy shall be deducted from the amount insured hereunder and these Underwriters shall be liable only for the proportion which such net amount bears to the contributory value.

10 This insurance also specially to cover cost of repairs, and/or loss of or damage to the property hereby insured, directly caused by accidents in loading, discharging or handling cargo or by any object whatsoever coming in contact therewith, or caused through negligence and/or error of judgment of Master, Mariners, Engineers, or other servants or employees of the Owners and/or Charterers and/or Operators and/or Lessees. Pilots, Servants, or Employees of Port, Harbour or Dock Authorities, Stevedores, Labourers, Tradesmen or other Persons in, on or about the Dock, or through contact with air-craft, or objects dropping therefrom, or through explosions, howsoever or wheresoever occurring, bursting of boilers, breakage of machinery or shafts, or through any latent defect in the Machinery or Hull (excluding, however, the cost and expense of repairing or renewing the defective part), causing loss or injury to the property hereby insured, provided such loss or damage has not resulted from want of due diligence by the owners of the dock, or any of them, or by the Manager, and to cover all risks incidental to Navigation, or in graving docks, Master, Mates, Engineers, Pilots, or crew not to be considered as part owners within the meaning of this clause should they hold shares in the property. Seaworthiness admitted.

~~THIS INSURANCE ALSO COVERS ALL LOSS AND/OR DAMAGE AND/OR EXPENSE CAUSED TO THE DOCK HEREBY INSURED BY ANY VESSEL AND/OR CRAFT AND/OR STRUCTURE ENTERING AND/OR IN AND/OR LEAVING THE DOCK.~~

Including loss or damage directly or indirectly caused by earthquake, volcanic eruption, or tidal wave.

This policy also covers all loss and/or damage and/or expense caused to the dock hereby insured by any vessel and/or craft and/or structure entering and/or in and/or leaving the dock.

IN THE EVENT of this policy beginning or ending while the dock is in course of a voyage, underwriters agree to pay their proportion of loss or damage sustained while the policy is in force, provided the loss or damage sustained on the entire voyage would have been recoverable, if this policy had covered such voyage in its entirety.

No recovery for a Constructive Total Loss shall be had hereunder, unless the expense of recovering and repairing the dock shall exceed the insured value.

IN ASCERTAINING whether the dock is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the dock or wreck shall be taken into account.

IN NO CASE shall the Insurers be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this policy.

IT IS AGREED that any change of interest in the property hereby insured, shall not affect the validity of this policy.

HELD COVERED in case of any breach of warranty as to trade, locality or description provided notice be given, and any additional premium required be agreed as soon as practicable after receipt of advices.

Warranted free of liability for damage done to vessels, craft and/or structures or their cargoes or their freight whilst going on, whilst on and/or whilst going off the dock insured hereunder.


It is agreed to substitute the words "Marine Railway" for the word "Dock", where or whenever required.

### FULL COLLISION AND SISTER SHIP COLLISION CLAUSE

And it is further agreed that if the Dock hereby insured shall come into collision with any Ship or Vessel and the Assured or the Charterers or Operators or Lessees in consequence thereof or the Surety for any or all of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, we, the Underwriters, will pay the Assured or Charterers or Operators or Lessees such proportion of such sum or sums so paid as our respective subscriptions hereto bear to the value of the Dock hereby insured, provided always that our liability in respect of any one such collision shall not exceed our proportionate part of the value of the Dock hereby insured. And in cases where the liability of the Dock has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the dock, etc., we will also pay a like proportion of the costs which the Assured or Charterers or Operators or Lessees shall thereby incur, or be compelled to pay; but when both Dock and Vessel are to blame, then, unless the liability of the Owners or Charterers or Operators or Lessees of one or both of such Dock and Vessel become limited by law, claims under the Collision Clause shall be settled on the principle of Cross Liability as if the Owners or Charterers or Operators or Lessees of each had been compelled to pay to the Owners or Charterers or Operators or Lessees of the other such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to Assured or Charterers or Operators or Lessees in consequence of such collision.

## EXHIBIT "B" TO STIPULATION OF FACTS—2a

(Page 2)

(See opposite) 

Definitive Numbers of the Syndicates and Amount, Percentage or Proportion of the  
Total Amount insured shared between the Members of those Syndicates.

The percentages signed in front of the  
percentage of the total amount  
(i.e. US\$3,000,000) and not  
of the policy amount.



AMOUNT PERCENTAGE OR PROPORTION  
CENT

1.58  
.26  
.11  
2.68  
2.81  
.31  
3.35  
1.34  
1.78  
.18  
.27  
2.23  
1.56  
1.34  
.45  
1.56  
.29  
1.07  
.21  
.21  
.22  
1.12  
.90  
1.67  
.67  
2.90

BROKER'S NO.	L.P.S.O. NO.	L.P.S.O. DATE	SYNDICATE	MEMBERS' REFERENCE
5425	001216	0597	665	8 59
2595	8	59		
3515	8	59		
3355	50	7/59		
934A	7 DK	31/59		
941A	7 DK	31/59		
4481	8	8 H/C	83	
6210	8	59	TOD	
1850	099	18	8 59	
1870	099	18	8 59	
2000	099	18	8 59	
1820	701X	7/62		
9951	0	8	59	
4381	0	8	59	
3541	8	8	59	
3681	8	8		
2631	0	8		
4501	9	8		
9021	9	8		
9991	9	8		
1581	9	8		
3165	37 T	19	8	
5901	9	8	59	
2741	8	8	59	
2321	9G59	DOCK	35	
4181	AG59	PWD	21	

AMOUNT PERCENTAGE OR PROPORTION

.22  
1.56  
.00  
.56  
.80  
.45  
.22  
.45  
.89  
.33  
.89  
1.12  
1.34  
.45  
.45  
.33  
.89  
.12  
.11  
.89  
.89  
.67  
.22  
.22  
.71  
.18

BROKER'S NO. L.P.S.O. NO. L.P.S.O. DATE

BROKER'S NO.	L.P.S.O. NO.	L.P.S.O. DATE	SYNDICATE	MEMBERS' REFERENCE
5425	001216	0597	20AK/10	8 50
720H	10	8	50	
8910	8			
6071	0	8		
1231	0	8		
2471	8	8		
1251	8	8		
6541	0	8		
2818	8	8	50	
2718	8	8	50	
1658	ENL			
4830	0/20			
7853	73/18	8	59	
4771	9	8		
8171	9	8	TO 5	
3091	0	8		
2590	CRAFT	18G	59	
2580	CRAFT	18G	59	
2720	CRAFT	18G	59	
4019	8	8	59	
7541	9	8	27 T	
5019	8	8	59	
5119	8	8	59	
7421	9G59	DOCK	8	
5351	9	8		
5361	9	8		

AMOUNT PERCENTAGE OR PROPORTION

BROKER'S NO.

L.P.S.O. SLIP NO.

L.P.S.O. DATE



AMOUNT PERCENTAGE OR PROPORTION

BROKER'S NO.

L.P.S.O. SLIP NO.

L.P.S.O. DATE

.21 9021 9 8  
 .21 9991 9 8  
 .22 1581 9 8  
 1.12 315 57 T 19 A  
 .90 5901 9 8 59  
 1.67 2741 8 8 59  
 .67 2321 9G59 DOCK 95  
 2.90 4181 1 AG59 PWD 2 1

.11  
 .A9  
 .A9  
 .67  
 .22  
 .22  
 .71  
 .18

272 CRAFT 1 AG 59  
 401 9 8 59  
 7541 9 8 27 T  
 501 9 8 59  
 511 9 8 59  
 7421 9G59 DOCK 9  
 5351 9 8  
 5361 9 8

AMOUNT PERCENTAGE OR PROPORTION

BROKER'S NO. LPSO SLIP NO. LPSO DATE  
 5425 001216 059

SYNDICATE UNDERWRITER'S REFERENCE

.11 4211 1 AG59 PWD 2 1  
 .06 4191 1 AG59 PWD 2 1  
 1.43 7071 1 8 8 59  
 .36 7331 1 8 8 59  
 1.78 1081 1 8 8  
 .45 1011 1 8 8  
 .60 6321 1 8 8  
 .74 6331 1 8 8  
 .67 8981 1 8 8 59  
 .67 725 AK / MISC  
 .45 8681 1 9 8 C  
 .22 5021 1 9 8 C  
 .78 6211 1 9 8 59 DO  
 .45 3291 1 9 8  
 .50 4651 1 9 8 59  
 .17 8881 1 9 8 59  
 .90 8551 1 9 8 DK 959  
 1.12 2131 1 9 8 5062  
 .22 2061 1 9 8 5062  
 .22 2031 1 9 8 5062  
 .22 2071 1 9 8 5062  
 .90 3041 1 8 8 59 T 7 1  
 .90 7641 1 8 8 59 PR  
 1.12 2991 1 8 8 59 C 14  
 .22 2981 1 8 8 59 C 14  
 .90 22 AK / 19 8 59

AMOUNT PERCENTAGE OR PROPORTION

BROKER'S NO. LPSO SLIP NO. LPSO DATE  
 5425 001216 059

SYNDICATE UNDERWRITER'S REFERENCE


.45 7901 1 8 8  
 .56 2221 1 8 8  
 .11 2241 1 8 8  
 .22 3201 1 9 8 59  
 .33 926 AK / 19 8 59  
 .33 2841 1 9 8 59  
 .31 1140 / S  
 .07 1110 / S  
 .07 3190 / S  
 .22 3151 1 9 8 59 01  
 .33 801 1 9 8  
 .67 1151 1 9 8  
 .50 3801 1 9 5 59  
 .22 2641 1 9 8 59  
 .33 3951 1 9 8  
 .33 2871 1 9 8 59 9 / MC  
 .22 341 1 9 8 59  
 .22 663 T 19 8 59  
 .33 3581 1 9 8 59





## EXHIBIT "B" TO STIPULATION OF FACTS—2a

(Page 3)

(See opposite) 

Loss, if any, under this policy shall be adjusted with Todd Shipyards Corporation and the proceeds at the direction of the Government shall be payable to Todd Shipyards Corporation; and proceeds not paid to Todd Shipyards Corporation shall be payable to the Treasurer of the United States of America.

The Assured shall be directly liable to the Assurers for all premiums under this policy. In the event of the non-payment of premium hereunder when due the Assurers may cancel this policy by giving thirty (30) days' written notice to Todd Shipyards Corporation and the Department of the Navy, Office of Naval Material, Insurance Branch, Washington, 25, D.C. A written and/or telegraphic notice by or through the brokers who negotiated the insurance to Todd Shipyards Corporation at their last known address and to the Department of the Navy, Office of Naval Material, Insurance Branch, Washington, 25, D.C. shall constitute a complete notice as required under this clause. Such cancellation shall be without prejudice to premiums earned and due for the period the policy is in force.

The value of dock equipment, if any, owned by the Assured and situated on shore such as switchboards, transformers, electrical equipment, panels etc. not to exceed 10% of the total valuation.

This insurance also covers damage to or destruction of the property insured directly caused by strikers, locked-out workmen or persons taking part in labor disturbances or riots or civil commotions or caused by vandalism, sabotage or malicious mischief, but excluding civil war, revolution rebellion, or insurrection or civil strife arising therefrom and warranted free from any claim for delay, detention or loss of use.

Notwithstanding the exclusions in the F.C. & S. Clause in the within policy "vandalism", "sabotage" and "malicious mischief" as used herein, shall be construed to include wilful or malicious physical injury to or destruction of the described property caused by acts committed by an agent of any Government party or faction engaged in war, hostilities or other warlike operations, provided such agent is acting secretly and not in connection with

at the direction of the  
to Todd Shipyards Corporation; and proceeds  
to Todd Shipyards Corporation shall be payable to the  
Treasurer of the United States of America.

The Assured shall be directly liable to the Assurers for all premiums under this policy. In the event of the non-payment of premium hereunder when due the Assurers may cancel this policy by giving thirty (30) days' written notice to Todd Shipyards Corporation and the Department of the Navy, Office of Naval Material, Insurance Branch, Washington, 25, D.C. A written and/or telegraphic notice by or through the brokers who negotiated the insurance to Todd Shipyards Corporation at their last known address and to the Department of the Navy, Office of Naval Material, Insurance Branch, Washington, 25, D.C. shall constitute a complete notice as required under this clause. Such cancellation shall be without prejudice to premiums earned and due for the period the policy is in force.

The value of dock equipment, if any, owned by the Assured and situated on shore such as switchboards, transformers, electrical equipment, panels etc. not to exceed 10% of the total valuation.

This insurance also covers damage to or destruction of the property insured directly caused by strikers, locked-out workmen or persons taking part in labor disturbances or riots or civil commotions or caused by vandalism, sabotage or malicious mischief, but excluding civil war, revolution rebellion, or insurrection or civil strife arising therefrom and warranted free from any claim for delay, detention or loss of use.

Notwithstanding the exclusions in the F.C. & S. Clause in the within policy "vandalism", "sabotage" and "malicious mischief" as used herein, shall be construed to include wilful or malicious physical injury to or destruction of the described property caused by acts committed by an agent of any Government party or faction engaged in war, hostilities or other warlike operations, provided such agent is acting secretly and not in connection with any operations of military or naval armed forces in the country where the described property is situated.



TODD SHIPYARDS CORPORATION AND THE UNITED STATES OF AMERICA (Department of the Navy)

FOR ACCOUNT OF WHOM IT MAY CONCERN. LOSS, IF ANY, PAYABLE IN FUNDS CURRENT IN UNITED STATES OF AMERICA, TO

AS ATTACHED

OR ORDER

DO MAKE INSURANCE AND CAUSE TO BE INSURED

AT AND FROM THE 13th DAY OF September, 1959 AT NOON Eastern Standard TIME  
UNTIL THE 13th DAY OF September, 1960 AT NOON Eastern Standard TIME  
FOR US\$ 3,000,000 - hereto 69.00%

As employment may offer, in port or at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places and on all occasions, services and trades whatsoever and wheresoever, under power or sail, upon the Body, Tackle, Apparel, Machinery, Pumps, Equipment, Cradles, Power House, Hauling Machinery, Boilers, &c., Ordnance, Munitions, Stores, Artillery, Boat and other Furniture or equipment of whatever nature and everything connected therewith of and in the good

UNITED STATES NAVY THE 33 SECTION DRYDOCK AND P.O. 1.

3122

or by whatsoever other name or names the said dock is or shall be named or called, beginning the adventure upon the said dock, &c., as above, and shall so continue and endure during the period as aforesaid. Should the above dock at the expiration of this policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters be held covered at a pro rata monthly premium to her port of destination, and it shall be lawful for the said dock, &c., to proceed and sail to and touch and stay at any Ports or Places whatsoever and wheresoever without prejudice to this insurance. The said dock, &c., for so much as concerns the Assured, by agreement between the Assured and Assurers in this policy, is and shall be valued for all purposes of this insurance at \$ 3,000,000

- 3 Privilege to use dry dock sections separately or collectively without prejudice to this insurance.
- 4 TOUCHING the adventures and perils which we, the said assurers, are contented to bear and take upon us, they are of the Seas, Rivers, Lakes, Harbors, Fire, Pirates, Rovers, Assailing Thieves, Jettisons, Explosions, Riots, and all other perils, losses, and misfortunes of whatsoever nature arising either on shore or otherwise that have or shall come to the hurt, detriment, or damage of said dock, &c., or any part thereof. And in the case of any loss or misfortune it shall be lawful for the assured, their factors, servants and assigns, to sue, labor and travel for, in, and about the defense, safeguard and recovery of the said dock, &c., or any part thereof, without prejudice to this insurance; to the charges whereof the said insurance company will contribute according to the Rate and Quantity of the sum herein insured. And it is expressly declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment. Having been paid the consideration for this insurance, by the Assured or their assigns at and after the rate of 625 per cent. Inc 2 in 2.0. 1.0.0.
- 5 TO RETURN 2.3.9275 per cent net for every 15 days of unexpired time, if this insurance be cancelled, but there shall be no cancellation or return of premium in case of total loss of the property from any cause whatsoever.
- 6 To pay averages in full irrespective of percentage and repairs to be paid without deduction of new for old.
- 7 WITH LEAVE to sail with or without pilots, be towed, and to assist vessels and/or craft in all situations and to any extent to render salvage services, and to go on trial trips. Including risks of drydocking, undocking or changing docks or moving in harbours and going on and/or off slipway, gridiron or graving dock or pontoons as often as may be required and to adjust compasses.
- 8 General Average, Salvage and Special Charges payable as provided in the contract of affreightment, or failing such provisions, or there be no contract of affreightment, payable in accordance with the Laws and Usages of the Port of New York or San Francisco. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid in accordance with same.
- 9 When the contributory value of the dock is greater than the valuation herein the liability of these Underwriters for General Average contribution (except in respect to amount made good to the dock) or Salvage shall not exceed that proportion of the total contribution due from the dock that the amount insured hereunder bears to the contributory value; and if because of damage for which these Underwriters are liable as Particular Average the value of the dock has been reduced for the purpose of contribution, the amount of the Particular Average claim under this Policy shall be deducted from the amount insured hereunder and these Underwriters shall be liable only for the proportion which such net amount bears to the contributory value.
- 10 This insurance also specially to cover cost of repairs, and/or loss of or damage to the property hereby insured, directly caused by accidents in loading, discharging or handling cargo or by any object whatsoever coming in contact therewith, or caused through negligence and/or error of judgment of Master, Mariners, Engineers, or other servants or employees of the Owners and/or Charterers and/or Operators and/or Lessees. Pilots, Servants, or Employees of Port, Harbour or Dock Authorities, Stevedores, Labourers, Tradersmen or other Persons in, on or about the dock, or through contact with it.

damaged or break-up value of the dock or wreck shall be taken into account.

IN NO CASE shall the Insurers be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this policy.

IT IS AGREED that any change of interest in the property hereby insured, shall not affect the validity of this policy.

HELD COVERED in case of any breach of warranty as to trade, locality or description provided notice be given, and any additional premium required be agreed as soon as practicable after receipt of advices.

Warranted free of liability for damage done to vessels, craft and/or structures or their cargoes or their freight whilst going on, whilst on and/or whilst going off the dock insured hereunder.

It is agreed to substitute the words "Marine Railway" for the word "Dock", where or whenever required.

### FULL COLLISION AND SISTER SHIP COLLISION CLAUSE

And it is further agreed that if the Dock hereby insured shall come into collision with any Ship or Vessel and the Assured or the Charterers or Operators or Lessees in consequence thereof or the Surety for any or all of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums so paid as our respective subscriptions hereto bear to the value of the Dock hereby insured, or Operators or Lessees such proportion of such sum or sums in respect of such collision, we, the Underwriters, will pay the Assured or Charterers or Operators or Lessees such proportion of such sum or sums so paid as our respective subscriptions hereto bear to the value of the Dock hereby insured. And in provided always that our liability in respect of any one such collision shall not exceed our proportionate part of the value of the Dock hereby insured. And in cases where the liability of the Dock has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the dock, etc., we will also pay a like proportion of the costs which the Assured or Charterers or Operators or Lessees shall thereby incur, or be compelled to pay; but when both Dock and Vessel are to blame, then, unless the liability of the Owners or Charterers or Operators or Lessees of one or both of such Dock and Vessel become limited by law, claims under the Collision Clause shall be settled on the principle of Cross Liability as if the Owners or Charterers or Operators or Lessees of each had been compelled to pay to the Owners or Charterers or Operators or Lessees of the other such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to Assured or Charterers or Operators or Lessees in consequence of such collision; and it is further agreed that the principles involved in this clause shall apply to the case where both Dock and Vessel are the property, in part or in whole, of the same Owners or Charterers or Operators or Lessees, all questions of responsibility and amount of liability as between the two being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the Managing Owners or Charterers or Operators or Lessees of both and one to be appointed by the majority (in amount) of Underwriters interested; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference, and the decision of such single, or of any two of such three Arbitrators, appointed as above to be final and binding. PROVIDED ALWAYS THAT THIS CLAUSE SHALL ALSO EXTEND to any sum which the Assured or Charterers or Operators or Lessees may become liable to pay or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages and similar structures, consequent on such collision, or in respect of the Insured Dock BUT EXCLUDING LIABILITY FOR LOSS OF LIFE OR PERSONAL INJURY.

And it is further agreed that in the event of salvage, towage or other assistance being rendered to the Dock hereby insured by any Vessel belonging in part or in whole to the same Owners or Charterers or Operators or Lessees, the value of such services (without regard to the common ownership or control of the Vessel) shall be ascertained by arbitration in the manner above provided for under the Collision Clause, and the amount so awarded so far as applicable to the interest hereby insured shall constitute a charge under this Policy.

### PROTECTION AND INDEMNITY CLAUSE

AND WE FURTHER AGREE that if the Assured and/or charterers and/or operators and/or lessees shall become liable to pay and shall pay any sum or sums in respect of any responsibility, claim, demand, damages, and/or expenses or shall incur any other loss arising from or occasioned by any of the following matters or things during the currency of this policy in respect of the dock hereby insured, that is to say:

25 Loss or damage in respect of any other ship or boat or in respect of any goods, merchandise, freight or other things or interests whatsoever on board such other ship or boat, caused proximately or otherwise by the dock insured in so far as the same is not covered by the Collision Clause herein set forth.

26 Loss or damage to any goods, merchandise, freight or other things or interests whatsoever, other than as aforesaid, whether on board the said dock or not which may arise from any cause whatever.

27 Loss or damage to any harbor, dock, graving or otherwise, slipway, way, gridiron, pontoon, pier, quay, jetty, stage, buoy, telegraph cable, or other fixed or movable thing whatsoever or to any goods or property in or on or about the same, howsoever caused.

28 Any attempted or actual raising, removal or destruction of the wreck of the said dock or the cargo thereof, or any neglect or failure to raise, remove or destroy the same.

29 Any sum or sums for which the Assured and/or charterers and/or operators and/or lessees may become liable or incur from causes not hereinbefore specified, but which are or have heretofore been absolutely or conditionally recoverable from or undertaken by British Protection and Indemnity Clubs, but excluding loss of life or personal injury.

30 We will pay the Assured and/or charterers and/or operators and/or lessees such proportion of such sum or sums so paid, or which may be required to indemnify the Assured and/or charterers and/or operators and/or lessees for such loss as our respective subscriptions bear to the policy value of the dock hereby insured, and in case the liability of the Assured and/or charterers and/or operators and/or lessees has been contested, with the consent in writing of a majority of the Underwriters on the dock hereby insured (in amount), we will also pay a like proportion of the costs which the Assured and/or charterers and/or operators and/or lessees shall thereby incur or be compelled to pay.

31 This insurance also to pay the expenses, after deduction of the proceeds of the salvage, not recoverable under Clause 28, of the removal of the wreck of the insured dock from any place owned, leased or occupied by the Assured. Underwriters' Liability under this clause is subject to the limitations in amount provided in Clause 30. The provisions of that clause regarding the payment of costs shall apply also hereto.

32 It is further agreed that in all cases of common ownership of dock or other property the matter shall be dealt with in accordance with the principles laid down in the sistership clauses incorporated in the collision clause.

### FREE OF CAPTURE AND SEIZURE CLAUSE (WAR RISK EXCLUSION)

Unless otherwise deleted by the Underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provision



or other fixed or movable thing whatsoever or to any goods or property in or on or about the same, howsoever caused.

Any attempted or actual raising, removal or destruction of the wreck of the said dock or the cargo thereof, or any neglect or failure to raise, remove or destroy the same.

Any sum or sums for which the Assured and/or charterers and/or operators and/or lessees may become liable or incur from causes not hereinbefore specified, but which are or have heretofore been absolutely or conditionally recoverable from or undertaken by British Protection and Indemnity Clubs, but excluding loss of life or personal injury.

We will pay the Assured and/or charterers and/or operators and/or lessees such proportion of such sum or sums so paid, or which may be required to indemnify the Assured and/or charterers and/or operators and/or lessees for such loss as our respective subscriptions bear to the policy value of the dock hereby insured, and in case the liability of the Assured and/or charterers and/or operators and/or lessees has been contested, with the consent in writing of a majority of the Underwriters on the dock hereby insured (in amount), we will also pay a like proportion of the costs which the Assured and/or charterers and/or operators and/or lessees shall thereby incur or be compelled to pay.

This insurance also to pay the expenses, after deduction of the proceeds of the salvage, not recoverable under Clause 28, of the removal of the wreck of the insured dock from any place owned, leased or occupied by the Assured. Underwriters' Liability under this clause is subject to the limitations in amount provided in Clause 30. The provisions of that clause regarding the payment of costs shall apply also hereto.

It is further agreed that in all cases of common ownership of dock or other property the matter shall be dealt with in accordance with the principles laid down in the sisterhip clauses incorporated in the collision clause.

### FREE OF CAPTURE AND SEIZURE CLAUSE (WAR RISK EXCLUSION)

Unless physically deleted by the Underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provision of the Policy:

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment or the consequences thereof or of any attempt thereat, or any taking of the Dock, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration or war or not), but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire or explosion unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power.

Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy. If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

### NON PAYMENT OF PREMIUM CLAUSE (applicable to insurance placed in London or outside U. S. A.)

The Assured shall be directly liable to the Assurer for all premiums under this policy. If payment of premium is not made by the Assured within 10 days after attachment of the insurance or, in the event the Assurers shall have agreed to accept deferred payments, if any, payment of premium is not made on the day agreed, this policy may be cancelled by the Assurers giving to the Assured named herein five days' notice of such cancellation. A written and/or telegraphic notice by or through the brokers, or their American Correspondents, who negotiated the insurance, to said Assured at his last known address shall constitute a complete notice as required under this clause. Such cancellation shall be without prejudice to premiums earned and due for the period the policy is in force.

### NON PAYMENT OF PREMIUM CLAUSE (applicable to insurance placed in U. S. A.)

The Assured shall be directly liable to the Assurer for all premiums under this policy. If payment of premium is not made by the Assured within thirty (30) days after attachment of the insurance, or, in the event the Assurers shall have agreed to accept deferred payments, if any payment of any premium is not made on the day agreed, this policy may be cancelled at any time thereafter by the Assurer giving to the Assured named herein, and to third party payee or payees (if any) named in the policy, five (5) days' notice of such cancellation. Such notice may be given either by the Assurer itself or in its behalf by the Board of Marine Underwriters of San Francisco, Incorporated. Such cancellation shall be without prejudice to the premiums earned and due for the period the policy was in force.

The terms and conditions of this form are to be regarded as substituted for those of policy form to which it is attached, the latter being hereby waived, except provisions required by law to be inserted in the Policy.

Attached to Policy No. H.D. 2193 of the 11. Y. 1959

Dated 7th September, 1959

53101 \* 14 AUG 1959

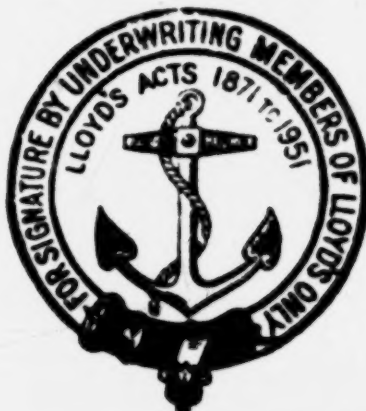
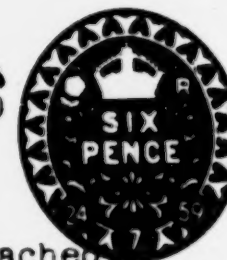
*No Policy or other Contract dated on or after 1st Jan., 1924, will be recognised by the Committee of Lloyd's as entitling the holder to the benefit of the Funds and/or Guarantees lodged by the Underwriters of the Policy or Contract as security for their liabilities unless it bears at foot the Seal of Lloyd's Policy Signing Office.*

J (A)

Form approved by Lloyd's  
Underwriters' Fire and  
Non Marine Association.

# LLOYD'S POLICY

*(Subscribed only by Underwriting Members of Lloyd's all of whom have complied with the requirements of the Insurance Companies Act, 1958, as to security and otherwise.)*



Any person not an Underwriting Member of Lloyd's subscribing this Policy, or any person uttering the same if so subscribed, will be liable to be proceeded against under Lloyd's Acts.

**Whereas** TODD SHIPYARDS CORPORATION etc., - as attached,

~~of~~

(hereinafter called "the Assured"), have paid \$18,534.51

Premium or Consideration to Us, who have hereunto subscribed our Names to Insure against Loss as follows:-

\$1.000 = US\$1,087,335

PIERS AND/OR PLANT etc., - as per schedule attached valued at \$1,332,600.

Printed at Lloyd's, London, England.


12378

Subject to the clauses as attached.

No. 52/24 / 68/24

## EXHIBIT "B" TO STIPULATION OF FACTS—2a

(Page 4)

(See opposite) 



### U.S. GOVERNMENT CONTRACT CLAUSE

It is understood that the Assured may enter into contracts with the United States Government or departments or agencies thereof which would include a provision substantially as follows:-

"Vessel will proceed to the contractor's plant under her own power or in tow of Coast Guard vessel. Contractor shall provide all necessary towage, handling etc. to place the vessel at his wharf. Contractor shall also provide all necessary towage, handling etc. to remove vessel from yard. The Government shall not be responsible for damage done to contractor's property and/or other vessel in contractor's yard etc. while vessel is under tow of tugs provided by contractor or while vessel is being moved by contractor about the yard". }

It is understood and agreed that the acceptance by the Assured of any contracts which contain said provision shall not prejudice this insurance and these Assurers waive subrogation rights against the United States Government or any departments or agencies thereof.

### TOWAGE CONTRACT CLAUSES

Where in accordance with established local practice, the Assured or the charterer or the agent of the Assured enters into towage contracts under which the Assured, the charterer or the agent of the Assured assumes liability for any damages resulting from collision of the vessel insured with another ship or vessel including the towing vessel, and agrees to indemnify the towboat, her owners, charterers, operators, managers, agents and/or pilots against loss or liability for any such damage, it is agreed that amounts paid by the Assured, charterer or the agent of the Assured pursuant to such agreement, in respect of such damage caused by collision between the vessel insured and any other ship or vessel, shall be deemed payments 'by way of damages to any other person or persons' within the meaning of the Collision Clause in this policy to the extent that such payments would

under which the Assured, the charterer or the agent of the Assured assumes liability for any damages resulting from collision of the vessel insured with another ship or vessel including the towing vessel, and agrees to indemnify the towboat, her owners, charterers, operators, managers, agents and/or pilots against loss or liability for any such damage, it is agreed that amounts paid by the Assured, charterer or the agent of the Assured pursuant to such agreement, in respect of such damage caused by collision between the vessel insured and any other ship or vessel, shall be deemed payments 'by way of damages to any other person or persons' within the meaning of the Collision Clause in this policy to the extent that such payments would have been covered under the said Collision Clause if the insured vessel had been responsible for the damage in the absence of any agreement.

The Assured shall not be prejudiced by reason of any agreement limiting or exempting the liability of tugs and/or towboats and/or their owners when the Assured is compelled to accept such contracts.

#### SERVICE OF SUIT (U.S.A.)

The place of physical and actual issue and delivery of this policy is the City of London, but nevertheless as between the Assured and the Assurers the place of suit hereon shall be deemed the United States of America, and any suit hereon may be brought against these Assurers in any Court of competent jurisdiction within the United States. The summons and other legal processes may be served on these Assurers by and in behalf of the Assured by mailing a copy thereof by United States registered mail addressed to Russel T. Mount, Wilbur H. Hecht, or Frank A. Bull, all of the law firm of Mendes and Mount, 27 William Street, New York, City, New York, each of whom these Assurers hereby authorize to accept by and in their behalf such summons and other legal processes against these Assurers in any Court of competent jurisdiction within the United States. The mailing, as herein provided, of such summons or other legal process shall be deemed personal service and accepted by these Assurers as such, and shall be legal and binding upon these Assurers for all the purposes of the suit. Final judgment against these Assurers in any such suit shall be conclusive, and it may be enforced in other jurisdictions, including Great Britain by suit on the judgment, a certified or

The place of physical and actual issue and delivery of this policy is the City of London, but nevertheless as between the Assured and the Assurers the place of suit hereon shall be deemed the United States of America, and any suit hereon may be brought against these Assurers in any Court of competent jurisdiction within the United States. The summons and other legal processes may be served on these Assurers by and in behalf of the Assured by mailing a copy thereof by United States registered mail addressed to Russel T. Mount, Wilbur H. Hecht, or Frank A. Bull, all of the law firm of Mendes and Mount, 27 William Street, New York, City, New York, each of whom these Assurers hereby authorize to accept by and in their behalf such summons and other legal processes against these Assurers in any Court of competent jurisdiction within the United States. The mailing, as herein provided, of such summons or other legal process shall be deemed personal service and accepted by these Assurers as such, and shall be legal and binding upon these Assurers for all the purposes of the suit. Final judgment against these Assurers in any such suit shall be conclusive, and it may be enforced in other jurisdictions, including Great Britain by suit on the judgment, a certified or exemplified copy of which shall be conclusive evidence of the fact and of the amount of this indebtedness. The right of the Assured to bring suit as provided herein shall be limited to a suit brought in its own name and for its own account. For the purpose of suit as herein provided, the word "Assured" includes any mortgagee under a ship mortgage and any person succeeding to the rights of any such mortgagee.

IF AND WHEN APPLICABLE


**SERVICE OF SUIT CLAUSE (NEW YORK) (MARINE)**

*(Approved by Lloyd's Underwriters' Association.)*

Underwriters hereon hereby designate the Superintendent of Insurance of the State of New York or his successor in office their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the (re)insured or any beneficiary hereunder arising out of this contract of (re)insurance.

EXHIBIT "B" TO STIPULATION OF FACTS—2a

(Page 5)

(See opposite) 



In all communications please quote  
the following reference

**542**

H.D.3193

**LLOYD'S**



**LONDON**

*Griswold & Co. Inc.*  
*New York*

London 7th September 1959.

U.S. NAVY THREE SECTION STEEL DRYDOCK

12 months @ N.13.9.1959

£ 69% part of 100% of  
US\$3,000,000 @ .625 %

**IMPORTANT.**

Before presenting this Policy for payment of  
any claim or return of premium, it is essential  
that it shall bear the signature of the firm or  
individual in whose name it is drawn.

U.S. NAVY THREE SECTION STEEL BRIDOCK

12 months @ N.13.9.1959

69% part of 100% of  
US\$3,000,000 @ .625 %

---

**IMPORTANT.**

Before presenting this Policy for payment of any claim or return of premium, it is essential that it shall bear the signature of the firm or individual in whose name it is drawn.

(In the event of accident whereby loss or damage may result in a claim under this Policy, the settlement will be much facilitated if immediate notice be given to the nearest Lloyd's Agent.)


(E)

95

104

## EXHIBIT "B" TO STIPULATION OF FACTS—3a

(Page 1)

(See opposite) 



during the period commencing with the 16th

of May, 1959 and ending with the 16th

of May, 1960 ~~both days included~~ beginning and ending with 12.01 am., Eastern Standard Time

If the Assured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this Policy shall become void, and all claim thereunder shall be forfeited.

NOW KNOW YE, that We the Underwriters, members of the Syndicate(s) whose definitive Number(s) in the Schedule hereto are set out in the Table overleaf, or attached overleaf, hereby bind Ourselves, each for his own part and not one for Another, our Heirs, Executors, and Administrators, and in respect of his due proportion only, to pay or make good to the Assured or the Assured's Executors, Administrators, and Assigns, or to indemnify him or them against all such Loss, Damage or Liability as aforesaid (subject to the conditions herein expressed) not exceeding the Sum of One Million, Eighty-Seven Thousand,

Three Hundred and Thirty-Five, United States Dollars.

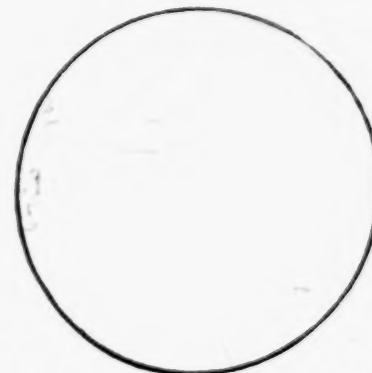
payment to be made within Seven Days after such Loss, Damage or Liability is proved, and so that the due proportion for which each of Us the Underwriters is liable shall be ascertained by reference to his proportion as ascertained according to the said Schedule of the Amount, Percentage or Proportion of the total Sum Assured which is in the said Table set opposite the definitive Number of the Syndicate of which such Underwriter is a Member.

IN WITNESS whereof the Manager of Lloyd's Policy Signing Office has subscribed his Name on behalf of each of Us.

LLOYD'S POLICY SIGNING OFFICE


MANAGER.

Dated in London, the Seventeenth  
Day of May, One Thousand Nine Hundred  
and Fifty-Nine.



## EXHIBIT "B" TO STIPULATION OF FACTS—3a

(Page 2)


(See opposite) 

**Definitive Numbers of Syndicates and Amount, Percentage or Proportion of the Total Sum  
Assured shared between the Members of those Syndicates.**

AMOUNT, PERCENTAGE OR PROPORTION	BROKER'S NO	L.P.S.O. SLIP NO	L.P.S.O. DATE	AMOUNT, PERCENTAGE OR PROPORTION	BROKER'S NO	L.P.S.O. SLIP NO	L.P.S.O. DATE
<b>PER CENT</b>	<b>509</b>	<b>5310114</b>	<b>8591</b>		<b>509</b>	<b>5310114</b>	<b>8591</b>
	<b>SYNDICATE</b>	<b>UNDERWRITER'S REFERENCE</b>			<b>SYNDICATE</b>	<b>UNDERWRITER'S REFERENCE</b>	
6.749	933	13 5		.307	203	25 5	5052
6.135	17	13Y59	6/4/97	.613	590	25 5	59
6.135	334	PIERS	13 5 59	1.534	299	18 5	59C1694
6.135	448	14 5	59 HCA3	1.227	284	25 5	59
6.135	418	13 5	59PWD11	1.534	89	25 5	T/18
.613	421	13 5	59PWD11				
6.135	108	13 5					
.920	101	13 5					
3.681	185	8 0 63	15Y59				
.368	187	8 0 63	15Y59				
.552	28	0 63	15Y59				
2.070	632	PIER	15 5				
2.531	633	PIER	15 5				
5.215	720	T 15	5 9				
4.601	368	13 5					
1.840	31	657 T					
3.068	65	15Y59	A23407				
3.068	707	15 5	59				
.736	263	13Y59	1/4246				
2.761	450	13Y59	1/4246				
.552	902	13Y59	1/4246				
.552	999	13Y59	1/4246				
.613	158	13Y59	1/4246				
3.681	764	15 5	59PL PR				
1.304	213	25 5	5052				
.230	206	25 5	5052				

## EXHIBIT "B" TO STIPULATION OF FACTS—3a


(Page 3)

(See opposite) 

[fols. 98, 99, 100, 101, 102, 103, 104]

## EXHIBIT "B" TO STIPULATION OF FACTS—3a

(Page 4)

(See opposite) 


5. All losses incurred hereunder shall reduce the liability under this insurance to the extent of the amount of same, but in the event of any but a total loss under this insurance, the amount of said loss shall be reinstated subject to all the terms and conditions of this insurance, the Assured warranting to pay pro rata premium upon the amount so reinstated from the date of the loss.
6. It shall be optional with Underwriters to repair or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice within fifteen (15) days after the Proof of Loss is submitted, of its intention to do so, but there can be no abandonment to Underwriters of the property described.
7. Underwriters shall not be liable for any loss, caused directly or indirectly by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; or (b) invasion, insurrection, rebellion, revolution, civil war, usurped power, or (c) seizure or destruction under Quarantine or Customs regulations confiscation by order of any Government or Public Authority, or risks of Contraband or Illegal Transportation or Trade.
8. In case the Assured and Underwriters shall fail to agree as to the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall then appraise the loss and damage, stating separately the loss or damage to each item, and failing to agree shall submit their differences to an umpire. Any award in writing, so itemized, of any two then filed with Underwriters shall determine the amount of the loss or damage. Each appraiser shall be paid by the party selecting him and the expense of appraisal and umpire shall be paid by the parties equally.
9. In all cases of loss the Assured shall, at the request of Underwriters or their Agents, assign and subrogate all their rights and claims against others to Underwriters at time of payment to an amount not exceeding the sum paid by Underwriters and permits suit to be brought in the Assured's name but at Underwriters' expense, and the Assured further agrees to render all reasonable assistance in the



- In case the Assured and Underwriters shall fail to agree on the amount of loss or damage, each shall, on the written demand of either, select a competent and disinterested appraiser. The appraisers shall then appraise the loss and damage, stating separately the loss or damage to each item, and failing to agree shall submit their differences to an umpire. Any award in writing, so itemized, of any two then filed with Underwriters shall determine the amount of the loss or damage. Each appraiser shall be paid by the party selecting him and the expense of appraisal and umpire shall be paid by the parties equally.
9. In all cases of loss the Assured shall, at the request of Underwriters or their Agents, assign and subrogate all their rights and claims against others to Underwriters at time of payment to an amount not exceeding the sum paid by Underwriters and permits suit to be brought in the Assured's name but at Underwriters' expense, and the Assured further agrees to render all reasonable assistance in the prosecution of said suit or suits.
10. It is understood that this insurance excludes:
- (a) Loss or damage to Assured's ferry racks caused by or resulting from collision with Assured's ferryboat, ~~subsidence~~ and or collapse.
  - (b) Loss or damage to Assured's pile clusters at New Orleans, La., caused by or resulting from collision with Assured's ferryboat, subsidence and or collapse.
  - (c) Loss or damage to piers at the Assured's New Orleans Plant caused by or resulting from collapse due to the accumulation of silt or the removal of same.
11. It is understood that this insurance does not cover claims for any loss or damage to the interest insured which, in the absence of this policy, are recoverable under Hull policies carried by the Assured on the Ferryboat TODDCO.

## EXHIBIT "B" TO STIPULATION OF FACTS—3a

(Page 5)

(See opposite) 

2-3-2-3

In all communications please quote the following reference	
509	59/BH 468/JY

**FORM J (A)**



---

*Assured* TODD SHIPYARDS CORPORATION etc.

*Premium*

*Policy and Stamp*

*Date of Expiry* 12.01 am. 16th May 1960  
E.S.T.

**Tax Stamps required by the United  
States Revenue Act of 1916 as amended  
July 1, 1948, affixed to cover note  
dated \_\_\_\_\_**

*Assured* TODD SHIPYARDS CORPORATION etc.

*Premium*


*Policy and Stamp*

*Date of Expiry* 12.01 am. 16th May 1960  
E.S.T.

*The Assured is requested to read this Policy and,  
if it is incorrect, return it immediately for alteration.*

In the event of any occurrence likely to  
result in a claim under this Policy, immediate  
notice should be given to:—

**MARSH & McLENNAN**  
**INSURANCE**

**EXHIBIT "B" TO STIPULATION OF FACTS—4****(Page 1)****(See opposite) **



The place of physical and actual issue and delivery of this policy is the City of London. Nevertheless (at the option of the Assured) as between the Assured and the Assurers the place of issue and delivery of the policy shall be considered the City of New York and all matters arising hereunder shall be determined in accordance with American law and practice. Any suit hereon may be brought against these Assurers in any Court of competent jurisdiction within the United States of America. The summons and other legal processes may be served on this Company by and in behalf of the Assured by mailing a copy thereof by United States registered mail addressed to Mr. Russell T. Mount, Mr. Wilbur H. Hecht or Mr. Frank A. Bull, all of the Law firm of Mendes & Mount, 27, William Street, New York 5, N.Y., each of whom this Company hereby authorizes to accept by and in its behalf such summons and other legal processes against this Company in any Court of competent jurisdiction within the United States of America. The mailing, as herein provided of such summons or other legal process shall be deemed personal service and accepted by this Company as such, and shall be legal and binding upon this Company for all the purposes of the suit. Final judgment against this Company in any such suit shall be conclusive; and it may be enforced in any other jurisdictions, including Great Britain, by suit on the judgment, a certified or exemplified copy of which shall be conclusive evidence of the fact and of the amount of this indebtedness. The right of the Assured to bring suit as provided herein shall be limited to a suit brought in its own name and for its own account. For the purposes of suit as herein provided the word "Assured" includes any mortgagee under a ship mortgage and any person succeeding to the rights of any such mortgagee.

The following clause to apply only if this Insurance is affected by the New York State Insurance Law :—

" Underwriters hereon hereby designate the Superintendent of Insurance of the State of New York or his successor in office their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the (re) insured or any beneficiary hereunder arising out of this contract of (re) insurance."

Endorsement to be attached to and made part of Policy No. \_\_\_\_\_

of the \_\_\_\_\_

issued to TODD SHIPYARDS CORPORATION, etal

on the INDUSTRIAL WORK PROPERTY DAMAGE LIABILITY- INSURANCE

The insurance afforded by this policy is hereby extended to cover the liability of the Assured for the loss or damage to property of Encinal Terminals and/or property of others in the care, custody, or control of said Encinal Terminals while situated in and/or adjacent to Warehouse building #3 on the premises of the Assured's San Francisco Division in Alameda, California, subleased by the Assured to said Encinal Terminals, where such loss or damage results from the fault or negligence of the Assured, its agents, servants and/or employees.

All other terms and conditions of policy remaining unchanged.

---

Johnson & Higgins  
Marine Department  
63 Wall St., NY 5

ASSURED. TODD SHIPYARDS CORPORATION AND/OR AFFILIATED AND/OR ASSOCIATED  
CORPORATIONS AND/OR COMPANIES. FOR ACCOUNT OF WHOM IT MAY CONCERN.

LOSS, IF ANY, PAYABLE TO TODD SHIPYARDS CORPORATION, OR ORDER

Attaching September 30, 1958, 12 01 AM Eastern Standard Time

Expiring September 30, 1959, 12 01 AM Eastern Standard Time.

1. \$1,000,000 being part of \$1,000,000. to cover the liability of the  
assured as hereinafter mentioned for work being performed at the following  
locations.

TODD SHIPYARDS CORPORATION (BROOKLYN DIVISION) Erie Basin Plant,  
Brooklyn, N. Y.

TODD SHIPYARDS CORPORATION (HOBOKEN DIVISION) Hoboken, N. J.

TODD SHIPYARDS CORPORATION (GALVESTON DIVISION) Galveston, Texas

TODD SHIPYARDS CORPORATION (PRODUCTS DIVISION) Houston, Texas; and  
Brooklyn, N. Y.

TODD SHIPYARDS CORPORATION (SAN FRANCISCO DIVISION) Alameda, California

TODD SHIPYARDS CORPORATION (LOS ANGELES DIVISION) San Pedro, California

TODD SHIPYARDS CORPORATION (NEW ORLEANS DIVISION) Lower and Upper  
Plants, New Orleans, La.

TODD SHIPYARDS CORPORATION (SEATTLE DIVISION) Seattle, Washington

or elsewhere within the territorial limits of the United States

2. To cover the assured's legal or assumed liability for loss or damage  
(including resultant loss of use) to property of others in its care,  
custody or control for repair, alteration, fabrication, construction  
and/or other work. Property of others shall be deemed to include  
identified property or components thereof, which the assured's cus-  
tomers have contracted to purchase, once such property or components  
thereof have been committed to alteration, fabrication, and/or  
construction and/or other work necessary for ultimate delivery to  
the customer.


3. To cover the assured's legal or assumed liability for loss or damage

customers have contracted to purchase, once such property or components thereof have been committed to alteration, fabrication, and/or construction and/or other work necessary for ultimate delivery to the customer.

3. To cover the assured's legal or assumed liability for loss or damage (including loss of use) to property of others not described in Clause 2 hereof caused by or arising out of performance of the work described in said Clause 2, whether or not the work concerns property of others in their care, custody or control.
4. To cover loss or damage to property of the assured (excluding tools and similar equipment) used or in process of use in the repair, alteration, fabrication, construction and/or other work described in Clause 2 hereof.
5. To cover the assured's legal or assumed liability for defective workmanship or materials incorporated in the work covered by Clause 2 hereof.
6. This policy shall not be reduced by any loss, paid or unpaid and is always open to apply in and for payment of claims in the full amount of its proportion of \$1,000,000 in respect of each and every claim coming within its terms, plus legal expenses and costs as herein provided.
7. Liability under this policy arising out of the same accident or occurrence shall be for the excess of \$2,500 of the total claims arising out of the same accident or occurrence.
8. It is understood and agreed that the aforesaid coverage shall not apply to loss, damage, defective workmanship or material occurring or discovered beyond 180 days from the date of delivery to the assured's customer.

EXHIBIT "B" TO STIPULATION OF FACTS—4

(Page 2)

(See opposite) 



76/89514

6.3830% Edinburgh Assurance Co.Ltd.,  
2.9786% Cornhill Insurance Co.Ltd.,  
1.2766% Merchants Marine Insurance Co.Ltd.,  
6.3830% Orion Insurance Co.Ltd., "T" a/c  
6.3830% Fine Art General Insurance Co.Ltd.,/National  
Provincial Insurance Co.Ltd.,  
2.5531% British Fire Insurance Co.Ltd.,  
2.1277% Edinburgh Assurance Co.Ltd., No; 2 a/c  
71.9150% LLOYD'S UNDERWRITERS  
100.000%  
=====

during the period commencing with the 12.01am. 30th day of September, 1958  
and ending with the 12.01am. 30th day of September, 1959 both days inclusive.  
beginning and ending with EASTERN STANDARD TIME

If the Assured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this Policy shall become void, and all claim thereunder shall be forfeited.

NOW KNOW YE, that We the Underwriters hereby bind Ourselves, each for his own part and not one for Another, our Heirs, Executors, and Administrators, and in respect of his due proportion only, to pay or make good to the Assured or the Assured's Executors, Administrators, and Assigns, or to indemnify him or them against all such Loss, Damage or Liability as aforesaid (subject to the conditions herein expressed) not exceeding the Sum of

as above

payment to be made within Seven Days after such Loss, Damage or Liability is proved, and so that the due proportion for which each of Us the Underwriters is liable shall be ascertained by reference to his proportion as ascertained according to the Amount, Percentage or Proportion of the total Sum assured.

IN WITNESS whereof the Underwriters have subscribed their Names as hereinafter appears.

Dated in London, the 19th

Day of November,

One Thousand Nine Hundred and FIFTY EIGHT



9. It is further understood and agreed that the aforesaid coverage shall not apply to loss, damage, defective workmanship or material involving vessels undergoing repair, alteration, conversion or construction by the assured, nor to loss or damage to other property of any nature arising out of or resulting from such vessel repair, alteration, conversion or construction work.
10. The assured shall be directly liable to the assurer for all premiums under this policy. If payment of premium is not made by the assured within 10 days after attachment of the insurance, or, in the event the assurers shall have agreed to accept deferred payments, if any payment of premium is not made on the day agreed, this policy may be cancelled by the assurer giving to the assured named herein five days' notice of such cancellation. A written and/or telegraphic notice by or through the brokers, or their American Correspondents, who negotiated the insurance, to said assured at his last known address shall constitute a complete notice as required under this clause. Such cancellation shall be without prejudice to premiums earned and due for the period the policy is in force.
11. Insolvency or bankruptcy of the assured shall not act to debar recovery hereunder and these assurers agree that in the event of the inability of the assured to pay liability arising from perils insured against hereunder, to pay such claim or part thereof for which this policy may be liable.
12. And it is further agreed that in cases where the liability of the assured as aforesaid is investigated and/or contested with the consent of these assurers, this policy shall be liable for and will also pay in full without any deductions, costs and expenses paid and incurred in investigating, contesting or settling liability.
13. The Underwriters to be paid in consideration of this insurance \_\_\_\_\_ Dollars, being at premium of \$25,000.00.

such cancellation. A written and/or telegraphic notice by or through the brokers, or their American Correspondents, who negotiated the insurance, to said assured at his last known address shall constitute a complete notice as required under this clause. Such cancellation shall be without prejudice to premiums earned and due for the period the policy is in force.

11. Insolvency or bankruptcy of the assured shall not act to debar recovery hereunder and these assurers agree that in the event of the inability of the assured to pay liability arising from perils insured against hereunder, to pay such claim or part thereof for which this policy may be liable.
12. And it is further agreed that in cases where the liability of the assured as aforesaid is investigated and/or contested with the consent of these assurers, this policy shall be liable for and will also pay in full without any deductions, costs and expenses paid and incurred in investigating, contesting or settling liability.
13. The Underwriters to be paid in consideration of this insurance \_\_\_\_\_ Dollars, being at premium of \$25,000.00.

The terms and conditions of this form are to be regarded as substituted for those of the policy to which this form is attached, the latter being hereby waived.

Johnson & Higgins  
Marine Department  
63 Wall St., NY 5

## EXHIBIT "B" TO STIPULATION OF FACTS—4

(Page 3)

(See opposite) 

J (A)

PRO FORMA

Whereas WILLIS, TOWERS & WATSON LTD.,  
of LONDON  
for account of whom it may concern

(hereinafter called "the Assured"), have paid Premium of US. \$25,000 in  
Premium or Consideration to Us, who have hereunto subscribed our Names to Insure against Loss <sup>full</sup>  
follows:—

100 per cent of  
US. \$1,000,000

This insurance is to cover the Legal or Assumed Liability  
of Todd Shipyards Corporation and/or Affiliated and/or  
Associated Corporations and/or Companies as per form  
attached.

Subject to the conditions of the attached clauses.

Insured with:—

No. 576/89514

6.3830% Edinburgh Assurance Co.Ltd.,  
2.9786% Cornhill Insurance Co.Ltd.,  
1.2766% Merchants Marine Insurance Co.Ltd.,  
6.3830% Orion Insurance Co.Ltd., "T" a/c  
6.3830% Fine Art & General Insurance Co.Ltd.,/National  
Provincial Insurance Co.Ltd.,  
2.5531% British Fire Insurance Co.Ltd.,  
2.1277% Edinburgh Assurance Co.Ltd., No; 2 a/c  
71.9150% LLOYD'S UNDERWRITERS

100.000%

=====

during the period commencing with the 12.01am. 30th day of September, 1958  
and ending with the 12.01am. 30th day of September, 1959 both days inclusive.

beginning and ending with EASTERN STANDARD TIME  
If the Assured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this Policy  
shall become void, and all claim thereunder shall be forfeited.

NOW KNOW YE, that We the Underwriters hereby bind Ourselves, each for his own part and not one for Another, our Heirs,  
Executors, and Administrators, and in respect of his due proportion, to the payment of the sum insured.

(b) \$1,000,000.00  
PROPERTY DAMAGE  
\$1,000,000.00  
\$1,000,000.00

ultimate net loss in respect of each accident but not exceeding  
ultimate net loss in the aggregate in any one policy year in respect of each hazard insured with an aggregate  
limit under the underlying policy/ies.

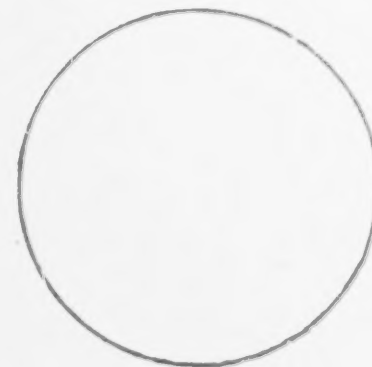
## DEFINITIONS

1. ACCIDENT. The word "accident" shall be understood to mean an accident or series of accidents arising out of one event or occurrence.
2. ULTIMATE NET LOSS. The words "ultimate net loss" shall be understood to mean the sums paid in settlement of losses for which the Assured is liable after making deductions for all recoveries, salvages and other insurances (other than recoveries under the policy/ies of the Primary Insurers), whether recoverable or not, and shall exclude all expenses and "Costs."
3. COSTS. The word "Costs" shall be understood to mean interest on judgment, investigation, adjustment and legal expenses (excluding, however, all expenses for salaried employees and retained counsel of and all office expenses of the Assured).
4. POLICY YEAR. The words "policy year" shall be understood to mean a period of one calendar year commencing each year on the day and hour first named above.

## CONDITIONS

1. PAYMENT OF COSTS. "Costs" incurred by the Assured personally with the written consent of the Underwriters, and for which the Assured is not covered by the said Primary Insurers, shall be apportioned as follows:—
  - (a) In the event of claim or claims arising which appear likely to exceed the Primary Limit or Limits, no "Costs" shall be incurred by the Assured without the written consent of the Underwriters.
  - (b) Should such claim or claim become adjustable previous to going into court for not more than the Primary Limit or Limits, then no "Costs" shall be payable by the Underwriters.
  - (c) Should, however, the sum for which the said claim or claims may be so adjustable exceed the Primary Limit or Limits, then the Underwriters, if they consent to the proceedings continuing, shall contribute to the "Costs" incurred by the Assured in the ratio that their proportion of the ultimate net loss as finally adjusted bears to the whole amount of such ultimate net loss.
  - (d) In the event that the Assured elects not to appeal a judgment in excess of the Primary Limit or Limits the Underwriters may elect to conduct such appeal at their own cost and expense and shall be liable for the taxable court costs and interest incidental thereto, but in no event shall the total liability of the Underwriters exceed their limit or limits of liability as stated above, plus the expenses of such appeal.
2. APPLICATION OF SALVAGE. All salvages, recoveries or payments recovered or received subsequent to a loss settlement under this Policy shall be applied as if recovered or received prior to such settlement and all necessary adjustments shall then be made between the Assured and the Underwriters, provided always that nothing in this Policy shall be construed to mean that losses under this Policy are not recoverable until the Assured's ultimate net loss has been finally ascertained.
3. ATTACHMENT OF LIABILITY. Liability under this Policy shall not attach unless and until the Primary Insurers shall have admitted liability for the Primary Limit or Limits, or unless and until the Assured has by final judgment been adjudged to pay a sum which exceeds such Primary Limit or Limits.
4. MAINTENANCE OF PRIMARY INSURANCE. This Policy is subject to the same warranties, terms and conditions (except as regards the premium, the obligation to investigate and defend, the amount and limits of liability and the renewal agreement, if any, and except as otherwise provided herein) as are contained in or as may be added to the policy/ies of the Primary Insurers prior to the happening of an accident for which claim is made hereunder and should any alteration be made in the premium for the policy/ies of the Primary Insurers during the currency of this Policy, then the premium hereon shall be adjusted accordingly.


It is a condition of this Policy that the policy/ies of the Primary Insurers shall be maintained in full effect during the currency of this Policy except for any reduction of the aggregate limits contained therein solely by payment of claims in respect of accidents occurring during the policy year.



PP19

## EXHIBIT "B" TO STIPULATION OF FACTS—4

(Page 4)

(See opposite) 



RECEIVED AS OF THE 10th DAY  
NOVEMBER 1944  
U.S. AIR FORCE

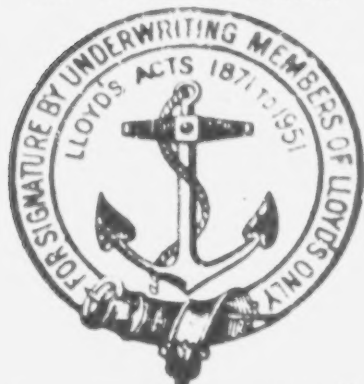
## EXHIBIT "B" TO STIPULATION OF FACTS—5a

(Page 1)

(See opposite) 

**T.P. 9**  
**(U.S.A. AND CANADA)**

Form approved by Lloyd's  
Underwriters' Fire and  
Non-Marine Association



Any person not an Underwriting  
Member of Lloyd's subscribing this  
Policy, or any person uttering the same  
if so subscribed, will be liable to be  
proceeded against under Lloyd's Acts

Printed at Lloyd's, London, England

No 59 137084.

No Policy or other Contract dated on or after 1st Jan., 1959, will be recognised by the Committee of Lloyd's  
as entitling the holder to the benefit of the Funds and/or guarantees lodged by the Underwriters of the Policy  
or Contract as security for their liabilities unless it bears at foot the Seal of Lloyd's Policy Signing Office

# LLOYD'S EXCESS PUBLIC LIABILITY, PROPERTY DAMAGE AND PRODUCTS LIABILITY POLICY

(DIRECT INSURANCE)

(Subscribed only by Underwriting Members of Lloyd's all of whom have complied with the  
requirements of the Assurance Companies Acts 1909 and 1946 as to security and otherwise.)



**Whereas**

TODD SHIPYARDS CORPORATION

of 1, Broadway, New York City, New York  
(hereinafter called "the Assured") has paid \$ - 3,720.15 part of U.S.\$4,500.00 Minimum and  
Premium or Consideration to the Underwriting Members of Lloyd's who have hereunto Deposit  
subscribed their Names,

**We the Underwriters** hereby agree, subject to the terms, conditions and limitations hereinafter mentioned, to indemnify the Assured in  
respect of accidents occurring during the period commencing 1st May 1959 Noon, and ending  
1st May 1960 Noon, Local Standard Time for any and all sums which the Assured shall by law become liable to pay and shall  
pay or by final judgment be adjudged to pay to any person or persons (excepting employees of the Assured injured during the course of their  
employment) as damages

(a) for bodily injuries, including death at any time resulting therefrom caused by accident, hereinafter referred to as "Bodily Injury",  
and

(b) for damage to or destruction of property of others (excluding property under the Assured's care, custody or control) caused by accident,  
hereinafter referred to as "Property Damage",

arising out of the hazards covered by and as defined in the underlying policy/ies specified in the Schedule herein and issued by the  
Travelers Insurance Company hereinafter called the "Primary Insurers",

**Provided always that** it is expressly agreed that liability shall attach to the Underwriters only after the Primary Insurers have paid or  
have been held liable to pay the full amount of their respective ultimate net loss liability as follows:—

(a) **BODILY INJURY**

\$ 25,000.00

ultimate net loss in respect of each person and, subject to that same limit each person,

\$ 25,000.00

ultimate net loss in respect of each accident but, as regards Products Liability,

\$ 100,000.00

ultimate net loss in the aggregate in any one policy year; and

(b) **PROPERTY DAMAGE**

\$ 25,000.00

ultimate net loss in respect of each accident,

\$ 100,000.00

ultimate net loss in the aggregate in any one policy year in respect of each hazard insured with an aggregate  
limit.

(all hereinafter referred to as the "Primary Limit or Limits");

and the Underwriters shall then be liable to pay only such additional amounts as will provide the Assured with a total coverage under the policy/ies  
of the Primary Insurers and this Policy combined of

(a) **BODILY INJURY**

\$ 300,000.00

ultimate net loss in respect of each person and, subject to that same limit each person,

\$1,000,000.00

ultimate net loss in respect of each accident but, as regards Products Liability, not exceeding

\$1,000,000.00

ultimate net loss in the aggregate in any one policy year; and

(b) **PROPERTY DAMAGE**

\$1,000,000.00

ultimate net loss in respect of each accident but not exceeding

\$ 100,000.00

ultimate net loss in the aggregate in any one policy year in respect of each hazard insured, with an aggregate limit;

(all hereinafter referred to as the "Primary Limit or Limits");

and the Underwriters shall then be liable to pay only such additional amounts as will provide the Assured with a total coverage under the policy/ies of the Primary Insurers and this Policy combined of

(a) **BODILY INJURY**

\$ 300,000.00

ultimate net loss in respect of each person and, subject to that same limit each person,

\$1,000,000.00

ultimate net loss in respect of each accident but, as regards Products Liability, not exceeding

\$1,000,000.00

ultimate net loss in the aggregate in any one policy year; and

(b) **PROPERTY DAMAGE**

\$1,000,000.00

ultimate net loss in respect of each accident but not exceeding

\$1,000,000.00

ultimate net loss in the aggregate in any one policy year in respect of each hazard insured with an aggregate limit under the underlying policy/ies.

## DEFINITIONS

1. **ACCIDENT.** The word "accident" shall be understood to mean an accident or series of accidents arising out of one event or occurrence.

2. **ULTIMATE NET LOSS.** The words "ultimate net loss" shall be understood to mean the sums paid in settlement of losses for which the Assured is liable after making deductions for all recoveries, salvages and other insurances (other than recoveries under the policy/ies of the Primary Insurers), whether recoverable or not, and shall exclude all expenses and "Costs."

3. **COSTS.** The word "Costs" shall be understood to mean interest on judgment, investigation, adjustment and legal expenses (excluding, however, all expenses for salaried employees and retained counsel of and all office expenses of the Assured).

4. **POLICY YEAR.** The words "policy year" shall be understood to mean a period of one calendar year commencing each year on the day and hour first named above.

## CONDITIONS

1. **PAYMENT OF COSTS.** "Costs" incurred by the Assured personally with the written consent of the Underwriters, and for which the Assured is not covered by the said Primary Insurers, shall be apportioned as follows:—

- (a) In the event of claim or claims arising which appear likely to exceed the Primary Limit or Limits, no "Costs" shall be incurred by the Assured without the written consent of the Underwriters.
- (b) Should such claim or claim become adjustable previous to going into court for not more than the Primary Limit or Limits, then no "Costs" shall be payable by the Underwriters.
- (c) Should, however, the sum for which the said claim or claims may be so adjustable exceed the Primary Limit or Limits, then the Underwriters, if they consent to the proceedings continuing, shall contribute to the "Costs" incurred by the Assured in the ratio that their proportion of the ultimate net loss as finally adjusted bears to the whole amount of such ultimate net loss.
- (d) In the event that the Assured elects not to appeal a judgment in excess of the Primary Limit or Limits the Underwriters may elect to conduct such appeal at their own cost and expense and shall be liable for the taxable court costs and interest incidental thereto, but in no event shall the total liability of the Underwriters exceed their limit or limits of liability as stated above, plus the expenses of such appeal.

2. **APPLICATION OF SALVAGE.** All salvages, recoveries or payments recovered or received subsequent to a loss settlement under this Policy shall be applied as if recovered or received prior to such settlement and all necessary adjustments shall then be made between the Assured and the Underwriters, provided always that nothing in this Policy shall be construed to mean that losses under this Policy are not recoverable until the Assured's ultimate net loss has been finally ascertained.


3. **ATTACHMENT OF LIABILITY.** Liability under this Policy shall not attach unless and until the Primary Insurers shall have admitted liability for the Primary Limit or Limits, or unless and until the Assured has by final judgment been adjudged to pay a sum which exceeds such Primary Limit or Limits.

4. **MAINTENANCE OF PRIMARY INSURANCE.** This Policy is subject to the same warranties, terms and conditions (except as regards the premium, the obligation to investigate and defend, the amount and limits of liability and the renewal agreement, if any, and except as otherwise provided herein) as are contained in or as may be added to the policy/ies of the Primary Insurers prior to the happening of an accident for which claim is made hereunder and should any alteration be made in the premium for the policy/ies of the Primary Insurers during the currency of this Policy, then the premium hereon shall be adjusted accordingly.



## EXHIBIT "B" TO STIPULATION OF FACTS—5a

(Page 2)

(See opposite) 



5. PREMIUM COMPUTATION: (delete clause not applicable).

- (a) The premium for this Policy represents <sup>33 1/3</sup> per cent. of the gross premium of the policy/ies of the Primary Insurers, subject to a minimum premium of \$ 4,500.00
- (b) The premium for this Policy is computed by applying to the gross premium of the policy/ies of the Primary Insurers a percentage calculated at \_\_\_\_\_ per cent. of the Manual Increase percentage in use by the Bureau Companies for ascertaining the difference in premium between
- (i) a policy with limits equal to the limits of the policy/ies of the Primary Insurers and
- (ii) a policy with limits equal to the limits of this Policy and of the policy/ies of the Primary Insurers combined, subject to a minimum premium of \$

6. CANCELLATION. This Policy may be cancelled at any time at the written request of the Assured or may be cancelled by or on behalf of the Underwriters provided ten days' notice in writing be given. If this Policy shall be cancelled by the Assured, the Underwriters shall retain the earned premium hereon for the period that this Policy has been in force or the short rate proportion, as set out overleaf, of the minimum premium whichever is the greater. If this Policy shall be cancelled by the Underwriters, they shall retain the earned premium hereon for the period that this Policy has been in force or *pro rata* of the minimum premium whichever is the greater. Notice of cancellation by the Underwriters shall be effective even though the Underwriters make no payment or tender of return premium.

7. NOTIFICATION OF CLAIMS. The Assured upon knowledge of any accident or occurrence likely to give rise to a claim hereunder shall give immediate written advice thereof to Hogg, Robinson & Capel-Cure (Canada) Ltd., Toronto.

8. FRAUDULENT CLAIMS. If the Assured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this Policy shall become void and all claim hereunder shall be forfeited.

**Now know Ye** that We, the Underwriters, members of the Syndicate(s) whose definitive Number(s) in the attached list are set out in the Table below, or attached below, hereby bind Ourselves, each for his own part and not one for Another, our Heirs, Executors and Administrators, and in respect of his due proportion only, to indemnify the Assured or the Assured's Executors, Administrators and Assigns against Liability and Costs as specified herein (subject to the conditions herein expressed), payment to be made within Seven Days after such Liability is proved, and so that the due proportion for which each of Us the Underwriters is liable shall be ascertained by reference to his proportion as ascertained according to the said List of the Amount, Percentage or Proportion of the total Sum assured which is in the said Table set opposite the definitive Number of the Syndicate of which such Underwriter is a member.

**In Witness** whereof the Manager of Lloyd's Policy Signing Office has subscribed his Name on behalf of each of Us.

LLOYD'S POLICY SIGNING OFFICE,

MANAGER

Dated in London, the 30th June, 1959.

SCHEDULE

DB/KJ

The underlying policy/ies hereinbefore mentioned:—

See Schedule attached




**Definitive Numbers of Syndicates and Amount, Percentage or Proportion of the Total Sum  
Assured shared between the Members of those Syndicates.**

AMOUNT, PERCENTAGE OR PROPORTION	BROKER'S NO	L.P.S.O. SLIP NO	L.P.S.O. DATE	AMOUNT, PERCENTAGE OR PROPORTION	BROKER'S NO	L.P.S.O. SLIP NO	L.P.S.O. DATE
PER CENT	542	63065	21 7 59 3		542	63065	21 7 59
	SYNDICATE	UNDERWRITER'S REFERENCE			SYNDICATE	UNDERWRITER'S REFERENCE	
9.90	933	6404L		1.98	438	17 4 59	
7.92	108	6 4 E					
1.90	101	6 4 E					
5.45	418	6 4 59 SRL					
4.95	448	6 4 59 LIAB					
4.95	368	6 4 23					
4.95	764	7 4 59 LL					
4.95	720	F 7 4 59					
4.95	621	LIAB A 552					
4.95	65	7 4 59					
2.48	380	16 4 59 TPL					
1.86	213	5054 16 4					
.59	206	5054 16 4					
.52	203	5054 16 4					
3.47	707	16 4 59					
1.48	733	16 4 59					
3.96	299	C29 7 4 59					
1.98	868	9 4 LIAB					
.50	502	9 4 LIAB					
1.98	165	RENL					
1.33	185	NM M/IC					
.15	187	NM M/IC					
1.34	632	16 4					
1.63	633	16 4					
1.48	274	16 4 59					
.99	315	9 4 59 01					

EXHIBIT "B" TO STIPULATION OF FACTS—5a

(Page 3)

(See opposite) 

## ENDORSEMENT. No.3

*This Endorsement is attached to, and forms part of, Lloyd's*

*Policy No. 59/137084.*

*in the name of* **TODD SHIPYARDS CORPORATION.**

This Policy covers for 82.67 % of the liability more fully  
set forth herein and the percentages signed hereon are  
percentages of 100% of such liability.

ALL OTHER TERMS AND CONDITIONS REMAINING UNALTERED

*London,*

*30th June, 195 9.*

NOTE.—This endorsement should be attached to the Policy to which it applies.

DR/K.I

## ENDORSEMENT. No.2

*This Endorsement is attached to, and forms part of, Lloyd's*

*Policy No. 59/137084.*

*in the name of* TODD SHIPYARDS CORPORATION.

Notwithstanding anything contained herein to the contrary, it is hereby understood and agreed that with respect to Bodily Injury only the following amendments shall be deemed to be made to this Policy:-

- (A) The words "caused by accident" shall be deemed to be deleted from sub-paragraph (A) of the first part of the Insuring Clause.
- (B) The words "accident" or "accidents" wherever appearing herein shall be deemed to read "occurrence" or "occurrences" respectively.
- (C) Definition No.1 (Accident) shall be deemed not to apply to such Bodily Injury and the following definition shall apply thereto:
  - (5) "Occurrence". The word "Occurrence" shall be understood to mean any one occurrence or series of occurrences arising out of one event.

ALL OTHER TERMS AND CONDITIONS REMAINING UNALTERED.

London, 30th June, 195 9.

DB/KJ

NOTE.— This endorsement should be attached to the Policy to which it applies.

# ENDORSEMENT. No.1

*This Endorsement is attached to, and forms part of, Lloyd's  
Policy No. 59/137084.*

*in the name of* TODD SHIPYARDS CORPORATION.

It is hereby understood and agreed that this Policy only covers Excess Bodily Injury and Property Damage including Products and Completed Operations Liability, but excluding Products Claims or Suits brought outside the United States of America and the Dominion of Canada and Property Damage in respect of Ship Repair Operations arising in respect of the operations of the Assured, as more fully described in the Primary Policy/ies.

ALL OTHER TERMS AND CONDITIONS REMAINING UNALTERED.

London, 30th June, 1959.

DB/KJ

NOTE.— This endorsement should be attached to the Policy to which it applies.

S C H E D U L E

Primary Bodily Injury and Property Damage including Products and Completed Operations Liability but excluding Products Claims or suits brought outside the United States of America and the Dominion of Canada, and Property Damage in respect of Ship Repair Operations Policy or Policies issued to the Assured by the Travelers Insurance Company for limits of:-

BODILY INJURY:

- U.S.\$ 25,000.00 ultimate nett loss in respect of each person and, subject to the same limit each person
- U.S.\$ 25,000.00 ultimate nett loss in respect of each occurrence but, as regards Products Liability
- U.S.\$100,000.00 ultimate nett loss in the aggregate in any one Policy Year; and

PROPERTY DAMAGE:

- U.S.\$ 25,000.00 ultimate nett loss in respect of each accident
- U.S.\$100,000.00 ultimate nett loss in the aggregate in any one Policy Year in respect of each hazard insured with an aggregate limit.



(c) to the furnishing of services, materials, parts or equipment by an insured in connection with the planning, construction, maintenance, operation or use of any nuclear facility, (1) with respect to injury to or destruction of any nuclear facility or property thereat resulting from the nuclear energy hazard or (2) if the nuclear facility is located outside the United States of America, its territories or possessions, or Canada, with respect to injury, sickness, disease, death or destruction resulting from the nuclear energy hazard;

(d) to the transportation, handling, use, sale, distribution, or disposal of byproduct material, with respect to injury, sickness, disease, death or destruction resulting from the nuclear energy hazard.

As used herein:

1. The term "nuclear energy hazard" means the radioactive, toxic, explosive or other hazardous properties of source material, special nuclear material or byproduct material.

2. The terms "source material", "special nuclear material" and "byproduct material" shall have the meanings given them in the Atomic Energy Act of 1954 or by any law amendatory thereof; provided, except for byproduct material (a) contained in or combined with special nuclear material or (b) held, stored, transported or disposed of as waste by or on behalf of a nuclear facility, "byproduct material" shall not include any radioactive isotope away from a nuclear facility.

3. The term "nuclear facility" means:

(a) any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

(b) any equipment or device (i) designed or used for the separation of the isotopes of uranium or plutonium, (ii) designed or used for the processing, fabricating or alloying of special nuclear material or of irradiated materials containing special nuclear material, (iii) incorporating or making use of such irradiated materials, or (iv) designed or used for processing waste byproduct material;

(c) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste source material or waste consisting of or containing special nuclear material or byproduct material;

and includes the site on which any of the foregoing is located, together with all operations conducted thereon and all premises used for such operations. Subdivision (ii) of paragraph (b) foregoing is not applicable to the occasional mechanical processing or fabricating of special nuclear material by any person or organization at a location which contains no equipment, device or apparatus otherwise defined herein as a nuclear facility, where special nuclear or byproduct material is not regularly handled, stored, or disposed of as waste, and which is principally used for other operations not related to the handling, fabricating or use of special nuclear material.

4. With respect to injury to or destruction of property, the word "injury" or "destruction" includes all forms of radioactive contamination of property.

## EXHIBIT "B" TO STIPULATION OF FACTS—5a

(Page 4)

(See opposite) 

material, with respect to injury, sickness, disease, death or destruction resulting from the nuclear energy hazard.

As used herein:

1. The term "nuclear energy hazard" means the radioactive, toxic, explosive or other hazardous properties of source material, special nuclear material or byproduct material.

2. The terms "source material", "special nuclear material" and "byproduct material" shall have the meanings given them in the Atomic Energy Act of 1954 or by any law amendatory thereof; provided, except for byproduct material (a) contained in or combined with special nuclear material or (b) held, stored, transported or disposed of as waste by or on behalf of a nuclear facility, "byproduct material" shall not include any radioactive isotope away from a nuclear facility.

3. The term "nuclear facility" means:

(a) any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

(b) any equipment or device (i) designed or used for the separation of the isotopes of uranium or plutonium, (ii) designed or used for the processing, fabricating or alloying of special nuclear material or of irradiated materials containing special nuclear material, (iii) incorporating or making use of such irradiated materials, or (iv) designed or used for processing waste byproduct material;

(c) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste source material or waste consisting of or containing special nuclear material or byproduct material;

and includes the site on which any of the foregoing is located, together with all operations conducted thereon and all premises used for such operations. Subdivision (ii) of paragraph (b) foregoing is not applicable to the occasional mechanical processing or fabricating of special nuclear material by any person or organization at a location which contains no equipment, device or apparatus otherwise defined herein as a nuclear facility, where special nuclear or byproduct material is not regularly handled, stored, or disposed of as waste, and which is principally used for other operations not related to the handling, fabricating or use of special nuclear material.

4. With respect to injury to or destruction of property, the word "injury" or "destruction" includes all forms of radioactive contamination of property.

It is understood and agreed that, except as specifically provided in the foregoing to the contrary, this clause is subject to the terms, exclusions, conditions and limitations of the Policy to which it is attached.

\*Note:—As respects policies which afford liability coverages and other forms of coverage in addition, the words underlined should be amended to designate the liability coverages to which this clause is to apply.

**U.S.A.**

**TAX CLAUSE.**

*(Approved by Lloyd's Underwriters' Fire and Non-Marine Association.)*

It is understood and agreed that in the event of any return of premium becoming due hereunder the Underwriters will deduct from the amount of the return the same percentage as the allowance which they have made towards the Federal Stamp Tax.

Nevertheless where such return of premium becomes due owing to the cancellation hereof by Underwriters the above deduction of the tax allowance shall not be made except in so far as the Assured has a right to recover the tax from the U.S. Government.

---

Printed at Lloyd's, London, England.

**15/11/56**

**N.M.A. 1056**

U.S.A.

**TAX PAID CLAUSE.**

*(Approved by Lloyd's Underwriters' Fire and Non-Marine Association.)*

Notice is hereby given that the Underwriters have agreed to allow for the purpose of purchasing U.S. Government Stamps for attachment hereto **FOUR** per cent. of the premium payable hereon to the extent such premium is subject to Federal Stamp Tax.

---

Printed at Lloyd's, London, England.

**15/11/58**

**N.M.A. 1057**

## CLAIM NOTIFICATION CLAUSE (U.S.A.)

*(Approved by Lloyd's Underwriters' Fire and Non-Marine Association.)*

The Assured upon knowledge of any occurrence likely to give rise to a claim hereunder shall give immediate advice thereof to the Underwriters through

Hogg, Robinson & Capel-Cure (Canada) Ltd., Toronto

~~XX~~

When Underwriters will appoint an Approved Adjuster  
to assess the loss on behalf of Underwriters.

---

Printed at Lloyd's, London, England.

14/12/44

N.M.A. 358



*(Approved by Lloyd's Underwriters' Fire and Non-Marine Association.)*

It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the insured (or reinsured), will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

It is further agreed that service of process in such suit may be made upon

**Messrs. Mendes & Mount, Attorneys,  
27, William Street, New York 5, New York**

, and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the insured (or reinsured) to give a written undertaking to the insured (or reinsured) that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the insured (or reinsured) or any beneficiary hereunder arising out of this contract of insurance (or reinsurance), and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

Printed at Lloyd's, London, England.

22/5/62

N.M.A. 772

U.S.A.

**NUCLEAR INCIDENT EXCLUSION CLAUSE—LIABILITY—DIRECT (BROAD)**

*(Approved by Lloyd's Underwriters' Fire and Non-Marine Association.)*

*For attachment to insurances of the following classifications in the U.S.A., its Territories and Possessions, Puerto Rico and the Canal Zone:—*

*Owners, Landlords and Tenants Liability, Contractual Liability, Elevator Liability, Owners or Contractors (including railroad) Protective Liability, Manufacturers and Contractors Liability, Product Liability, Professional and Malpractice Liability, Storekeepers Liability, Garage Liability, Automobile Liability,*

*not being insurances of the classifications to which the Nuclear Incident Exclusion Clause—Liability—Direct (Limited) applies.*

This policy\*

does not apply:—

(a) to injury, sickness, disease, death or destruction with respect to which an insured under the policy is also an insured under a contract of nuclear energy liability insurance issued by the Nuclear Energy Liability Insurance Association or the Mutual Atomic Energy Liability Underwriters and in effect at the time of the occurrence resulting in such injury, sickness, disease, death or destruction; provided such contract of nuclear energy liability insurance shall be deemed to be in effect at the time of such occurrence notwithstanding such contract has terminated upon exhaustion of its limit of liability;


(b) to the ownership, maintenance, operation or use of a nuclear facility by or on behalf of an insured, with respect to injury, sickness, disease, death or destruction resulting from the nuclear energy hazard; provided that except for byproduct material, this paragraph (b) shall not apply to goods or products manufactured or handled by a nuclear facility owned, maintained, operated or used by or on behalf of an insured while such goods or products are away from such facility after sale or distribution to others;

(c) to the furnishing of services, materials, parts or equipment by an insured in connection with the planning, construction, maintenance, operation or use of any nuclear facility, (1) with respect to injury to or destruction of any nuclear facility or property thereat resulting from the nuclear energy hazard or (2) if the nuclear facility is located outside the United States of America, its territories or possessions, or Canada, with respect to injury, sickness, disease, death or destruction resulting from the nuclear energy hazard;

(d) to the transportation, handling, use, sale, distribution, or disposal of byproduct material, with respect to injury, sickness, disease, death or destruction resulting from the nuclear energy hazard.

EXHIBIT "B" TO STIPULATION OF FACTS—5a

(Page 5)

(See opposite) 

In all communications please quote  
the following reference

542

59/13708+  
HDR No.UL.112/32708

**FORM T.P.9**

**(U.S.A. AND CANADA)**

**LLOYD'S**



**LONDON**

**Excess Public Liability,  
Property Damage and Products  
Liability Policy  
(Direct Insurance)**

*Assured* **YODL SHIPYARDS CORPORATION.**

*Premium* **U.S. \$3,720.15**

*Policy and Stamp*

*Date of Expiry* **1st May 1960 Noon,  
Local Standard Time.**

*The Assured is requested to read this Policy and, if  
it is incorrect, return it immediately for alteration.*

**In the event of any occurrence likely to  
result in a claim under this Policy, immediate notice  
should be given to:—**

# SHORT RATE CANCELLATION TABLE

## A. For Insurances written for one year:

Days Insurance in Force	Per cent. of One Year Premium	Days Insurance in Force	Per cent. of One Year Premium
1	5	154-156	53
2	6	157-160	54
3-4	7	161-164	55
5-6	8	165-167	56
7-8	9	168-171	57
9-10	10	172-175	58
11-12	11	176-178	59
13-14	12	179-182 (6 months)	60
15-16	13	183-187	61
17-18	14	188-191	62
19-20	15	192-196	63
21-22	16	197-200	64
23-25	17	201-205	65
26-29	18	206-209	66
30-32 (1 month)	19	210-214 (7 months)	67
33-36	20	215-218	68
37-40	21	219-223	69
41-43	22	224-228	70
44-47	23	229-232	71
48-51	24	233-237	72
52-54	25	238-241	73
55-58	26	242-246 (8 months)	74
59-62 (2 months)	27	247-250	75
63-65	28	251-255	76
66-69	29	256-260	77
70-73	30	261-264	78
74-76	31	265-269	79
77-80	32	270-273 (9 months)	80
81-83	33	274-278	81
84-87	34	279-282	82
88-91 (3 months)	35	283-287	83
92-94	36	288-291	84
95-98	37	292-296	85
99-102	38	297-301	86
103-105	39	302-305 (10 months)	87
106-109	40	306-310	88
110-113	41	311-314	89
114-116	42	315-319	90
117-120	43	320-323	91
121-124 (4 months)	44	324-328	92
125-127	45	329-332	93
128-131	46	333-337 (11 months)	94
132-135	47	338-342	95
136-138	48	343-346	96
139-142	49	347-351	97
143-146	50	352-355	98
147-149	51	356-360	99
150-153 (5 months)	52	361-365 (12 months)	100

## B. For Insurances written for more or less than one year:—

1. If insurance has been in force for 12 months or less, apply the standard short rate table for annual insurances to the full annual premium determined as for an insurance written for a term of one year.
2. If insurance has been in force for more than 12 months:
  - a. Determine full annual premium as for an insurance written for a term of one year.
  - b. Deduct such premium from the full insurance premium, and on the remainder calculate the pro rata earned premium on the basis of the ratio of the length of time beyond one year the insurance has been in force to the length of time beyond one year for which the insurance was originally written.
  - c. Add premium produced in accordance with items (a) and (b) to obtain earned premium during full period insurance has been in force.

EXHIBIT "B" TO STIPULATION OF FACTS—6b

(Page 1)

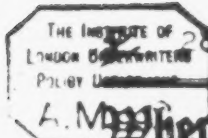
(See opposite) 2





# The Institute of London Underwriters.

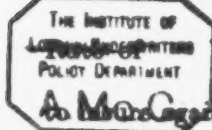
## Companies Combined Policy.



20.30% of the liability set forth in the attached wording

**Whereas** TODD SHIPYARDS CORPORATION  
of One Broadway, New York City, New York

hereinafter called the Assured, have promised to pay forthwith a Premium or Consideration at the



US.\$566.00 part of US.\$2,000.00 Minimum & Deposit

to Us, the Assurers,

to insure against loss as follows, viz. :—

EXCESS BODILY INJURY AND PROPERTY DAMAGE INCLUDING PRODUCTS AND COMPLETED OPERATIONS  
LIABILITY BUT EXCLUDING PRODUCTS CLAIMS OR SUITS BROUGHT OUTSIDE THE UNITED STATES  
OF AMERICA AND THE DOMINION OF CANADA AND PROPERTY DAMAGE IN RESPECT OF SHIP  
REPAIR OPERATIONS

This Insurance is subject to the provisions of the attached wording which is incorporated in and forms part of this Policy

during the period commencing with the

1st



May

1959 Noon and ending

with the 1st

day of May

1960

Local Standard Time

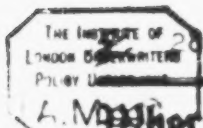
Wherever the word "Underwriters" appears herein it shall be read as "Assurers"

**Now know ye** that we the Assurers do hereby bind ourselves, each **Company** for itself only and not one for another and in respect only of the due proportion of each Company, to pay to the Assured or the Assured's Executors, Administrators and Assigns, all such loss as above stated that the Assured may sustain during the aforesaid period, not exceeding in all the sum insured, as properly apportioned to the sums, or to the percentages or proportions of the sum insured, subscribed against our names respectively. If the Assured shall make any claim knowing the same to be false or fraudulent as regards amount or otherwise, this Policy shall become void and all claim thereunder shall be forfeited.

IN WITNESS whereof we the said Assurers have subscribed our names and sums assured in London this  
30th day of June 1959, and the Secretary of The Institute of London Underwriters  
has subscribed his name on behalf of each of us.

# The Institute of London Underwriters.

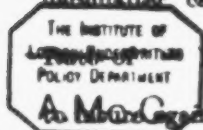
## Companies Combined Policy.



20.50% of the liability set forth in the attached wording

Whereas TODD SHIPYARDS CORPORATION  
of One Broadway, New York City, New York

hereinafter called the Assured, have promised to pay forthwith a Premium or Consideration at the



US.\$566.00 part of US.\$2,000.00 Minimum & Deposit

to Us, the Assurers,

to insure against loss as follows, viz.:-

EXCESS BODILY INJURY AND PROPERTY DAMAGE INCLUDING PRODUCTS AND COMPLETED OPERATIONS  
LIABILITY BUT EXCLUDING PRODUCTS CLAIMS OR SUITS BROUGHT OUTSIDE THE UNITED STATES  
OF AMERICA AND THE DOMINION OF CANADA AND PROPERTY DAMAGE IN RESPECT OF SHIP  
REPAIR OPERATIONS

This Insurance is subject to the provisions of the attached wording which is  
incorporated in and forms part of this policy

during the period commencing with the 1st day of May 1959, and ending  
with the 1st day of May 1960, Noon and ending  
Local Standard Time



Wherever the word "Underwriters" appears herein it shall be read as "Assurers"

Now know ye that we the Assurers do hereby bind ourselves, each Company for itself only and  
not one for another and in respect only of the due proportion of each Company, to pay to the Assured or the  
Assured's Executors, Administrators and Assigns, all such loss as above stated that the Assured may  
sustain during the aforesaid period, not exceeding in all the sum insured, as properly apportioned to the sums,  
or to the percentages or proportions of the sum insured, subscribed against our names respectively.  
If the Assured shall make any claim knowing the same to be false or fraudulent as regards amount or otherwise,  
this Policy shall become void and all claim thereunder shall be forfeited.

IN WITNESS whereof we the said Assurers have subscribed our names and sums assured in London this  
30th day of June 1959, and the Secretary of The Institute of London Underwriters  
has subscribed his name on behalf of each of us.



*Wm. L. Day*



MDD


Signed

Secretary,  
The Institute of London Underwriters.

NOTE. This Policy must bear the seal of The Institute of London Underwriters Policy Department

## EXHIBIT "B" TO STIPULATION OF FACTS—6b

(Page 2)

(See opposite) 

Amount, in full, of  
the sum insured.

(company).

Reference.

4.71 ORION INSURANCE CO. LTD.

Talc

1500

6.4.59

4.71 ORION INSURANCE CO. LTD.

Talc

8000

ENGLISH & ... 3. CO. LTD. 50%

7.08 ECONOMIC INSURANCE LTD.

50%

A. A/O.

7.4.59

7.08 ANDREW WEIR INSURANCE CO., LTD.

17.4.59

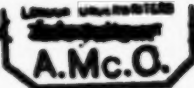
4.72 EDINBURGH ASSURANCE CO., LTD. No. 2 A/c.

A23296

(1)

## ENDORSEMENT.

No.3.

This Endorsement is attached to, and forms part of  Institute of London Underwriters

Policy No. 59/137085

in the name of TODD SHIPYARDS CORPORATION

The premium for this Policy represents 50 per cent of the Gross Premium for the undermentioned limits of the Policy/ies of the Travelers Insurance Company; Commercial Insurance Company; and certain Underwriters at Lloyd's, London and certain British Companies, subject to a minimum premium of US.\$2,000.00.

### BODILY INJURY

- US.\$275,000.00 ultimate nett loss in respect of each person and, subject to the same limit each person
- US.\$975,000.00 ultimate nett loss in respect of each occurrence, but as regards Products Liability
- US.\$900,000.00 ultimate nett loss in the aggregate in any one Policy Year; and

### PROPERTY DAMAGE

- US.\$975,000.00 ultimate nett loss in respect of each accident
- US.\$900,000.00 ultimate nett loss in the aggregate in any one Policy Year in respect of each hazard insured with an aggregate limit.

Excess of:

### BODILY INJURY

- US.\$ 25,000.00 ultimate nett loss in respect of each person and, subject to the same limit each person
- US.\$ 25,000.00 ultimate nett loss in respect of each occurrence but as regards Products Liability
- US.\$100,000.00 ultimate nett loss in the aggregate in any one Policy Year and

### PROPERTY DAMAGE

- US.\$ 25,000.00 ultimate nett loss in respect of each accident
- US.\$100,000.00 ultimate nett loss in the aggregate in any one Policy Year in respect of each hazard insured with an aggregate limit.

ALL OTHER TERMS AND CONDITIONS REMAINING UNALTERED

30th June

9


London.

195

NOTE. — This endorsement should be attached to the Policy to which it applies.

**EXHIBIT "B" TO STIPULATION OF FACTS—6b**

**(Page 3)**

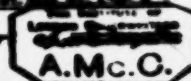
**(See opposite) **



*This Endorsement is attached to, and forms part of*

*Policy No. 59/137085*

*in the name of TODD SHIPYARDS CORPORATION*



Institute of London Underwriters

This Policy covers for <sup>28.30</sup> % of the liability more fully  
set forth herein and the percentages signed hereon are  
percentages of 100% of such liability.

ALL OTHER TERMS AND CONDITIONS REMAINING UNALTERED

London,

30th June

195<sup>9</sup>

NOTE.— This endorsement should be attached to the Policy to which it applies.



**EXHIBIT "B" TO STIPULATION OF FACTS—6b**

**(Page 4)**

**(See opposite) **

**It is hereby understood and agreed that the percentages signed by Underwriters are their proportions of the value shown herein.**

**No. 125.**

**M.N.Y. (3)**

**PAYMENT OF PREMIUMS.**

Notwithstanding anything in the policy or binder or certificate of insurance to which this provision is attached or upon which it is printed, and notwithstanding any custom or usage to the contrary, it is hereby agreed by and between the assured and the assurer as follows:-

The assured shall be directly liable to the assurer for all premiums under this policy which premiums shall be due and payable in advance on the date fixed between the assured and Marsh & McLennan. If default be made in the payment of the whole or any part of said premiums when the same become due respectively, this policy may be cancelled by notice given by the assurer to the assured by or through Marsh & McLennan by registered letter or a telegram which requires delivery to be notified to the sender. The despatch of such a letter or telegram addressed to the last known place of business of the assured shall constitute complete and sufficient notice and said cancellation shall be effective at midnight New York Time, on the fifth day after despatch of same, provided the default has not in the meantime been made good. Said cancellation shall be without prejudice to claims for premiums earned and due for the period while the policy is in force.

Unless physically deleted by the Underwriters, the following warranty shall supersede and nullify any contrary provision of the policy:

**P.3. S. CLAUSE**

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel by requisition or otherwise whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), but the foregoing shall not exclude collision, explosion or contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the Vessel concerned or, in the case of a collision, any other Vessel involved therein, is performing) by a hostile act by or against a belligerent power, and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power; also warranted free, whether in time of peace or war, from all loss or damage caused by any weapon of war employing atomic fission or radioactive force. Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom or piracy.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

WARRANTED free from loss or damage caused by strikers, locked-out workmen, or persons taking part in labor disturbances or riots or civil commotions.

WARRANTED free of claim for loss, damage or expense in consequence of any prohibition, restriction or embargo of or by any Government or of any violation or attempted violation thereof.

In case of any Loss or Misfortune it shall be lawful for the Assured, their Factors, Servants and Assigns, to sue, labor and travel for, in and about the Defence, Safeguard and Recovery of the said ship &c., or any part thereof, without prejudice to this insurance; to the charges whereof the said Underwriters will contribute according to the Rate and Quantity of the sum herein insured. And it is specially declared and agreed that no acts of the Assured or Assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

TODD SHIPYARDS CORPORATION

	<u>Amount</u>	<u>Rate</u>
A - New Orleans Division	\$ 327,000.	1.875%
B - Galveston Division	605,600	1.50%
C - Products Division	<u>400,000</u>	1.875%
	\$1,332,600	
	=====	

Applying hereto:- *81.595% = \$1084,335-*



### NEW YORK SUABLE CLAUSE.

The place of physical and actual issue and delivery of this policy is the City of London, but nevertheless as between the Assured and the Assurers the place of suit hereon shall be deemed the State of New York, United States of America and any suit hereon may be brought against this company in any Court of competent jurisdiction within the United States. The summons and other legal processes may be served on this company by and in behalf of the Assured by mailing a copy thereof by the United States registered mail addressed to Mr. Russel T. Mount, Mr. Wilbur H. Hecht, or Mr. Frank H. Bull, all of the law firm of Mendes & Mount, 27, William Street, New York City, New York, each of whom this company hereby authorises to accept by and in its behalf such summons and other legal processes against this Company in any Court of competent jurisdiction within the United States. The mailing as herein provided, of such summons or other legal processes shall be deemed personal service and accepted by this Company as such, and shall be legal and binding upon this Company for all the purposes of the suit. Final judgment against this Company in any such suit shall be conclusive; and it may be enforced in any other jurisdictions, including Great Britain, by suit on the judgment, a certified or exemplified copy of which shall be conclusive evidence of the fact and the amount of this indebtedness. The right of the Assured to bring suit as provided herein shall be limited to suit brought in its own name and for its own account. For the purposes of suit as herein provided, the word "Assured" includes any mortgagee under a ship mortgage and any persons succeeding to the rights of any such mortgagee.

The following clause shall apply, but only, if this insurance is affected by the New York Insurance Law.

### SERVICE OF SUIT CLAUSE.

#### NEW YORK.

Underwriters hereon hereby designate the Superintendent of Insurance of the State of New York or his successor in office their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the insured or any beneficiary hereunder arising out of this contract of insurance.

In the event of accident whereby loss or damage may result in a claim under this Policy, notice shall be given to the Underwriters, prior to survey, so that they may appoint their own Surveyor if they so desire; and whenever the extent of the damage is ascertainable, the majority (in amount) of the Underwriters may take or may require the Assured to take tenders for the repair of such damage.

No suit or action on this Policy for the recovery of any claim, shall be sustainable in any Court of law or equity unless the Assured shall have fully complied with all the terms and conditions of this Policy, nor unless commenced within twelve (12) months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the State wherein this Policy is issued, then and in that event no suit or action under this Policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such State.

THIS POLICY MAY BE CANCELLED at any time upon written request of the Assured, the Underwriters retaining or collecting the customary short rates for the time it has been in force; or, it may be cancelled by the Underwriters by delivering or mailing to the Assured at the Assured's last known address five days' written notice of such cancellation and, if the premium has been paid, by tendering in cash, postal money order, or check, the pro rata un-earned premium thereon. From all return premiums the same percentage of deductions (if any) shall be made as was allowed by these Assurers on receipt of original premium.

It is a condition of this Policy that any broker, person, firm or corporation who shall procure this insurance to be taken by the Underwriters, shall be deemed to be exclusively the agent of the Assured in any and all notices, transactions and representations relating to this insurance or connected with or arising out of the same during its continuance.

TODD SHIPYARDS CORPORATION (NEW ORLEANS DIVISION) AND/OR TODD SHIPYARDS CORPORATION (GALVESTON DIVISION) AND/OR TODD SHIPYARDS CORPORATION (PRODUCTS DIVISION) AS INTEREST MAY APPEAR.

For account of themselves.

Loss, if any, payable to Todd Shipyards Corporation, or order.

---

(Hereinafter referred to as the Assured)

1. Covering the Wharves, Piers and Bulkheads, including piling foundations, buildings thereon, approaches, tracking, and parts thereof and everything belonging thereto, described and valued for all purposes of this insurance, as below:-

PROPERTY INSURED

Valuation and  
Amount of Insurance

A. TODD SHIPYARDS CORPORATION (NEW ORLEANS DIVISION)

- i. Lower Plant - Hines Lane Wharf and Connecting  
Pier Lower Wharf (just east of  
Hines Lane Wharf)

\$300,000

27,000

\$ 327,000

B. TODD SHIPYARDS CORPORATION (GALVESTON DIVISION)

- I Pier "A" and Bulkhead \$100,000  
II Pier "B" and Bulkhead 25,000  
III Pier "C" and Bulkhead 250,000  
IV Small Boat Pier, approximately 62' long  
by 8' wide, extending from bulkhead on  
East side of Pier E 4,300  
V. Small Boat Pier, approximately 46' long  
by 2' wide, extending from bulkhead on  
East side of Pier E

1,300

\$ 605,600

\$ 605,600

C. TODD SHIPYARDS CORPORATION (PRODUCTS DIVISION)

I	Building ways located at the Wharf known as the Outfitting Wharf	\$200,000
II	Pier No.1 and Bulkhead (in damaged condition)	85,000
II	Pier No.2 and Bulkhead between Piers No.1 and No. 2	85,000
IV	"T" Head Pier	<u>30,000</u>

\$ 400,000

\$1,332,600

Applying hereto:- 81.595% = \$1,087,335

2. It is especially understood that this insurance is intended to indemnify the Assured for all loss, damage, and/or expense arising from perils insured to the actual replacement value of the property lost or damaged not exceeding the value for each item as provided herein but excluding wear, tear and gradual deterioration.

This insurance covers against the risks of collision, floods (meaning the rise of navigable waters, howsoever caused) subsidence and/or collapse; excluding, however, all loss or damage caused by or in consequence of fire, lightning, hurricane or tornado and any loss or damage resulting wholly and singularly from wear and tear or gradual deterioration.

It is hereby understood that no liability shall attach to these Underwriters for

- (a) the first \$1,500 of all collision claims hereunder, each accident, except items B.IV & V which shall be \$250.
- (b) the first \$250 of all other claims, each accident.
- (c) the first \$1,500 of all claims for launching damage in respect of building ways at outfitting Wharf (Item C.I. of Clause No.1)

## ENDORSEMENT.

No.2.

This Endorsement is attached to, and forms part of ~~AMAL~~ Institute of London Underwriters  
Policy No. 59/137085  
in the name of TODD SHIPYARDS CORPORATION

Notwithstanding anything contained herein to the contrary it is hereby understood and agreed that with respect to Bodily Injury only the following amendments shall be deemed to be made to this Policy:

- (A) The words "caused by accident" shall be deemed to be deleted from sub-paragraph (A) of the first part of the Insuring Clause.
- (B) The words "Accident" or "Accidents" wherever appearing herein shall be deemed to read "Occurrence" or "Occurrences" respectively
- (C) Definition No.1 (Accident) shall be deemed not to apply to such Bodily Injury and the following definition shall apply thereto:
  - (5) "Occurrence". The word "Occurrence" shall be understood to mean any one occurrence or series of occurrences arising out of one event.

ALL OTHER TERMS AND CONDITIONS REMAINING UNALTERED.

London.

30th June


1959

MDD

NOTE -- This endorsement should be attached to the Policy to which it applies

**EXHIBIT "B" TO STIPULATION OF FACTS—6b**

**(Page 5)**

**(See opposite) **



*This Endorsement is attached to, and forms part of, the* **A.M.C.O.** *Institute of London Underwriters*  
59/137085  
*Policy No.*

*in the name of* TODD SHIPYARDS CORPORATION

It is hereby understood and agreed that this Policy only covers  
Excess Bodily Injury and Property Damage including Products and Completed  
Operations Liability but excluding Property Damage in respect of Ship Repair  
Operations arising in respect of the operations of the Assured, as more fully  
described in the Primary Policy/ies.

ALL OTHER TERMS AND CONDITIONS REMAINING UNALTERED

*London,*

30th June ..... 195 9

NOTE.— This endorsement should be attached to the Policy to which it applies.

### SCHEDULE

Primary Bodily Injury, and Property Damage including Products and ~~other~~ **A.M.C.O.** Operations Liability but excluding Products Claims and Suits brought outside the United States of America, and the Dominion of Canada, and Property Damage in respect of Ship Repair Operations Policy or Policies issued to the Assured by the Travelers Insurance Company for limits of:

#### BODILY INJURY

- US.\$ 25,000.00 ultimate nett loss in respect of each person and, subject to the same limit each person
- US.\$ 25,000.00 ultimate nett loss in respect of each occurrence but, as regards Products Liability
- US.\$100,000.00 ultimate nett loss in the aggregate in any one Policy Year; and

#### PROPERTY DAMAGE

- US.\$ 25,000.00 ultimate nett loss in respect of each accident
- US.\$100,000.00 ultimate nett loss in the aggregate in any one Policy Year in respect of each hazard insured with an aggregate limit,

and First Excess Policy No. 59/137034 or any renewal or replacement thereof issued to the Assured by certain Underwriters at Lloyd's, London and certain British Companies for limits of:

#### BODILY INJURY

- US.\$275,000.00 ultimate nett loss in respect of each person and, subject to the same limit each person
- US.\$275,000.00 ultimate nett loss in respect of each occurrence but, as regards Products Liability
- US.\$900,000.00 ultimate nett loss in the aggregate in any one Policy Year; and

PROPERTY DAMAGE

US. \$ 25,000.00 ultimate nett loss in respect of each accident  
US. \$100,000.00 ultimate nett loss in the aggregate in any one Policy  
Year in respect of each hazard insured with an  
aggregate limit,

and First Excess Policy No. 59/137034 or any renewal or replacement thereof issued  
to the Assured by certain Underwriters at Lloyd's, London and certain British  
Companies for limits of:

BODILY INJURY

US. \$275,000.00 ultimate nett loss in respect of each person and,  
subject to the same limit each person  
US. \$275,000.00 ultimate nett loss in respect of each occurrence but,  
as regards Products Liability  
US. \$900,000.00 ultimate nett loss in the aggregate in any one Policy  
Year; and

PROPERTY DAMAGE

US. \$275,000.00 ultimate nett loss in respect of each accident  
US. \$900,000.00 ultimate nett loss in the aggregate in any one Policy  
Year in respect of each hazard insured with an aggregate  
limit

Primary Products Liability in respect of claims or suits brought outside the  
United States of America and the Dominion of Canada Policy or Policies issued  
to the Assured by the Commercial Insurance Company for limits of:-

BODILY INJURY

US. \$ 300,000.00 ultimate nett loss in respect of each person and,  
subject to the same limit each person.  
US. \$1,000,000.00 ultimate nett loss in respect of each occurrence but,  
as regards Products Liability  
US. \$1,000,000.00 ultimate nett loss in the aggregate in any one Policy  
Year; and

PROPERTY DAMAGE

US. \$1,000,000.00 ultimate nett loss in respect of each accident  
US. \$1,000,000.00 ultimate nett loss in the aggregate in any one Policy  
Year in respect of each hazard insured with an  
aggregate limit

This Endorsement is attached to, and forms part of, ~~London~~ **A.M.C.O.** Institute of London Underwriters  
Policy No. 59/137085

in the name of TODD SHIPYARDS CORPORATION

It is hereby understood and agreed that this Policy only covers  
Excess Bodily Injury and Property Damage including Products and Completed  
Operations Liability but excluding Property Damage in respect of Ship Repair  
Operations arising in respect of the operations of the Assured, as more fully  
described in the Primary Policy/ies.

ALL OTHER TERMS AND CONDITIONS REMAINING UNALTERED

London,

30th June 1959

NOTE.— This endorsement should be attached to the Policy to which it applies.

SCHEDULE

**Primary Liability, and property Damage including Products and Operations Liability but excluding Products Claims and Suits brought outside the United States of America and the Dominion of Canada, and Property Damage in respect of Ship Repair Operations Policy or Policies issued to the Assured by the Travelers Insurance Company for limits of:**

BODILY INJURY

- US.\$ 25,000.00 ultimate nett loss in respect of each person and, subject to the same limit each person
- US.\$ 25,000.00 ultimate nett loss in respect of each occurrence but, as regards Products Liability
- US.\$100,000.00 ultimate nett loss in the aggregate in any one Policy Year; and

PROPERTY DAMAGE

- US.\$ 25,000.00 ultimate nett loss in respect of each accident
- US.\$100,000.00 ultimate nett loss in the aggregate in any one Policy Year in respect of each hazard insured with an aggregate limit,

and First Excess Policy No. 59/137034 or any renewal or replacement thereof issued to the Assured by certain Underwriters at Lloyd's, London and certain British Companies for limits of:

BODILY INJURY

- US.\$25,000.00 ultimate nett loss in respect of each person and, subject to the same limit each person
- US.\$75,000.00 ultimate nett loss in respect of each occurrence but, as regards Products Liability
- US.\$900,000.00 ultimate nett loss in the aggregate in any one Policy Year; and

PROPERTY DAMAGE

US. \$ 25,000.00 ultimate nett loss in respect of each accident

US. \$100,000.00 ultimate nett loss in the aggregate in any one Policy Year in respect of each hazard insured with an aggregate limit,

and First Excess Policy No. 59/137034 or any renewal or replacement thereof issued to the Assured by certain Underwriters at Lloyd's, London and certain British Companies for limits of:

BODILY INJURY

US. \$275,000.00 ultimate nett loss in respect of each person and, subject to the same limit each person

US. \$275,000.00 ultimate nett loss in respect of each occurrence but, as regards Products Liability

US. \$900,000.00 ultimate nett loss in the aggregate in any one Policy Year; and

PROPERTY DAMAGE

US. \$275,000.00 ultimate nett loss in respect of each accident

US. \$900,000.00 ultimate nett loss in the aggregate in any one Policy Year in respect of each hazard insured with an aggregate limit

Primary Products Liability in respect of claims or suits brought outside the United States of America and the Dominion of Canada Policy or Policies issued to the Assured by the Commercial Insurance Company for limits of:-

BODILY INJURY

US. \$ 300,000.00 ultimate nett loss in respect of each person and, subject to the same limit each person.

US. \$1,000,000.00 ultimate nett loss in respect of each occurrence but, as regards Products Liability

US. \$1,000,000.00 ultimate nett loss in the aggregate in any one Policy Year; and

PROPERTY DAMAGE


US. \$1,000,000.00 ultimate nett loss in respect of each accident

US. \$1,000,000.00 ultimate nett loss in the aggregate in any one Policy Year in respect of each hazard insured with an aggregate limit



**EXHIBIT "B" TO STIPULATION OF FACTS—6b**

**(Page 6)**

**(See opposite) **

**U.S.A. AND CANADA.**

Form approved by Lloyd's  
Underwriters' Fire and  
Non-Marine Association.

**A.Mc.O.**

**EXCESS PUBLIC LIABILITY, PROPERTY DAMAGE  
AND PRODUCTS LIABILITY**

(Direct Insurance)

(T.P.9.)

THIS INSURANCE, subject to the terms, conditions and limitations hereinafter mentioned, is to indemnify the Assured in respect of accidents occurring during the period commencing **1st May 1960 Noon** and ending **1st May 1960 Noon** for any and all sums which the Assured shall by law become liable to pay and shall pay or by final judgment be adjudged to pay to any person or persons (excepting employees of the Assured injured during the course of their employment) as damages

(a) for bodily injuries, including death at any time resulting therefrom, caused by accident, hereinafter referred to as "Bodily Injury", and

(b) for damage to or destruction of property of others (excluding property under the Assured's care, custody or control) caused by accident, hereinafter referred to as "Property Damage", arising out of the hazards covered by and as defined in the underlying policy/ies specified in the Schedule herein and issued by the **Travelers Insurance Company, Commercial Insurance Company and certain British Companies** hereinafter called the "Primary Insurers",

PROVIDED ALWAYS THAT it is expressly agreed that liability shall attach to the Underwriters only after the Primary Insurers have paid or have been held liable to pay the full amount of their respective ultimate net loss liability as follows:

(a) **BODILY INJURY**

~~\$ 300,000.00~~ ultimate net loss in respect of each person and, subject to that same limit each person,  
~~\$1,000,000.00~~ ultimate net loss in respect of each accident but, as regards Products Liability,  
~~\$1,000,000.00~~ ultimate net loss in the aggregate in any one period of insurance; and

(b) **PROPERTY DAMAGE**

~~\$1,000,000.00~~ ultimate net loss in respect of each accident,  
~~\$1,000,000.00~~ ultimate net loss in the aggregate in any one period of insurance in respect of each hazard insured with an aggregate limit;

(all hereinafter referred to as the "Primary Limit or Limits");

and the Underwriters shall then be liable to pay only such additional amounts as will provide the Assured with a total coverage under the policy/ies of the Primary Insurers and this Insurance combined of

(a) **BODILY INJURY**

~~\$ 300,000.00~~ ultimate net loss in respect of each person and, subject to that same limit each person,  
~~\$2,000,000.00~~ ultimate net loss in respect of each accident but, as regards Products Liability, not exceeding  
~~\$2,000,000.00~~ ultimate net loss in the aggregate in any one period of insurance; and

(b) **PROPERTY DAMAGE**

~~\$2,000,000.00~~ ultimate net loss in respect of each accident but not exceeding  
~~\$2,000,000.00~~ ultimate net loss in the aggregate in any one period of insurance in respect of each hazard insured with an aggregate limit under the underlying policy/ies.

(a) **BODILY INJURY**

\$ 300,000.00 ultimate net loss in respect of each person and, subject to that same limit each person,  
\$1,000,000.00 ultimate net loss in respect of each accident but, as regards Products Liability,  
\$1,000,000.00 ultimate net loss in the aggregate in any one period of insurance; and

(b) **PROPERTY DAMAGE**

\$1,000,000.00 ultimate net loss in respect of each accident,  
\$1,000,000.00 ultimate net loss in the aggregate in any one period of insurance in respect of each  
hazard insured with an aggregate limit;

(all hereinafter referred to as the "Primary Limit or Limits");

and the Underwriters shall then be liable to pay only such additional amounts as will provide the Assured with a total coverage under the policy/ies of the Primary Insurers and this Insurance combined of

(a) **BODILY INJURY**

\$ 300,000.00 ultimate net loss in respect of each person and, subject to that same limit each person,  
\$2,000,000.00 ultimate net loss in respect of each accident but, as regards Products Liability, not  
exceeding  
\$2,000,000.00 ultimate net loss in the aggregate in any one period of insurance; and

(b) **PROPERTY DAMAGE**

\$2,000,000.00 ultimate net loss in respect of each accident but not exceeding  
\$2,000,000.00 ultimate net loss in the aggregate in any one period of insurance in respect of each  
hazard insured with an aggregate limit under the underlying policy/ies.

• **Local Standard Time**

**DEFINITIONS**

1. **ACCIDENT.**—The word "accident" shall be understood to mean an accident or series of accidents arising out of one event or occurrence.

2. **ULTIMATE NET LOSS.**—The words "ultimate net loss" shall be understood to mean the sums paid in settlement of losses for which the Assured is liable after making deductions for all recoveries, salvages and other insurances (other than recoveries under the policy/ies of the Primary Insurers), whether recoverable or not, and shall exclude all expenses and "Costs."

3. **COSTS.**—The word "Costs" shall be understood to mean interest on judgments, investigation, adjustment and legal expenses (excluding, however, all expenses for salaried employees and retained counsel of and all office expenses of the Assured).

4.—**PERIOD OF INSURANCE.**—The words "period of insurance" shall be understood to mean a period of one calendar year commencing each year on the day and hour first named above.


**CONDITIONS**

1. **PAYMENT OF COSTS.** "Costs" incurred by the Assured personally, with the written consent of the Underwriters, and for which the Assured is not covered by the said Primary Insurers, shall be apportioned as follows:—

- (a) In the event of claim or claims arising which appear likely to exceed the Primary Limit or Limits, no "Costs" shall be incurred by the Assured without the written consent of the Underwriters.
- (b) Should such claim or claims become adjustable previous to going into court for not more than the Primary Limit or Limits, then no "Costs" shall be payable by the Underwriters.
- (c) Should, however, the sum for which the said claim or claims may be so adjustable exceed the Primary Limit or Limits, then the Underwriters, if they consent to the proceedings continuing, shall contribute to the "Costs" incurred by the Assured in the ratio that their proportion of the ultimate net loss as finally adjusted bears to the whole amount of such ultimate net loss.

EXHIBIT "B" TO STIPULATION OF FACTS—6b

(Page 7)

(See opposite) 

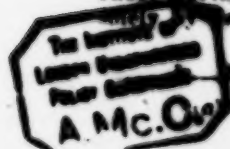
- (d) In the event that the Assured elects not to appeal a judgment in excess of the Primary Limit or Limits the Underwriters may elect to conduct such appeal at their own cost and expense and shall be liable for the taxable court costs and interest incidental thereto, but in no event shall the total liability of the Underwriters exceed their limit or limits of liability as stated above, plus the expenses of such appeal.

2. APPLICATION OF SALVAGE. All salvages, recoveries or payments recovered or received subsequent to a loss settlement under this Insurance shall be applied as if recovered or received prior to such settlement and all necessary adjustments shall then be made between the Assured and the Underwriters, provided always that nothing in this Insurance shall be construed to mean that losses under this Insurance are not recoverable until the Assured's ultimate net loss has been finally ascertained.

3. ATTACHMENT OF LIABILITY. Liability under this Insurance shall not attach unless and until the Primary Insurers shall have admitted liability for the Primary Limit or Limits, or unless and until the Assured has by final judgment been adjudged to pay a sum which exceeds such Primary Limit or Limits.

MAINTENANCE OF PRIMARY INSURANCE. This Insurance is subject to the same warranties, terms and conditions (except as regards the premium, the obligation to investigate and defend, the amount and limits of liability and the renewal agreement, if any, and except as otherwise provided herein) as are contained in or as may be added to the policy/ies of the Primary Insurers prior to the happening of an accident for which claim is made hereunder and should any alteration be made in the premium for the policy/ies of the Primary Insurers during the currency of this Insurance, then the premium hereon shall be adjusted accordingly.

It is a condition of this Insurance that the policy/ies of the Primary Insurers shall be maintained in full effect during the currency of this Insurance except for any reduction of the aggregate limits contained therein and payment of claims in respect of accidents occurring during the period of insurance.



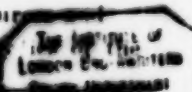
~~Insurance Commission (which clause is not applicable).~~

The premium for this Insurance represents \_\_\_\_\_ per cent. of the gross premium of the policy/ies of the Primary Insurers, subject to a minimum premium of \$ \_\_\_\_\_

- (b) The premium for this Insurance is computed by applying to the gross premium of the policy/ies of the Primary Insurers a percentage calculated at \_\_\_\_\_ per cent. of the Manual Increase percentage in use by the Bureau Companies for ascertaining the difference in premium between

(i) a policy with limits equal to the limits of the policy/ies of the Primary Insurers and

(ii) a policy with limits equal to the limits of this Insurance and of the policy/ies of the Primary Insurers combined, subject to a minimum premium of \$ \_\_\_\_\_



**A.M.C.C.**

~~Minimum Construction (delete clause not applicable).~~

The premium for this Insurance represents  $\frac{\quad}{\quad}$  per cent. of the gross premium of the policy/ies of the Primary Insurers, subject to a minimum premium of \$  $\frac{\quad}{\quad}$

(b) The premium for this Insurance is computed by applying to the gross premium of the policy/ies of the Primary Insurers a percentage calculated at  $\frac{\quad}{\quad}$  per cent. of the Manual Increase percentage in use by the Bureau Companies for ascertaining the difference in premium between

(i) a policy with limits equal to the limits of the policy/ies of the Primary Insurers and

(ii) a policy with limits equal to the limits of this Insurance and of the policy/ies of the Primary Insurers combined, subject to a minimum premium of \$  $\frac{\quad}{\quad}$

**A.M.C.C.**

6. CANCELLATION. This Insurance may be cancelled at any time at the written request of the Assured. If this Insurance shall be cancelled by or on behalf of the Underwriters provided ten days' notice in writing be given. If this Insurance shall be cancelled by the Assured, the Underwriters shall retain the earned premium hereon for the period that this Insurance has been in force or the short rate proportion, as set out below, of the minimum premium whichever is the greater. If this Insurance shall be cancelled by the Underwriters, they shall retain the earned premium hereon for the period that this Insurance has been in force or pro rata of the minimum premium whichever is the greater. Notice of cancellation by the Underwriters shall be effective even though the Underwriters make no payment or tender of return premium.

7. NOTIFICATION OF CLAIMS. The Assured upon knowledge of any accident or occurrence likely to give rise to a claim hereunder shall give immediate written advice thereof to **Hogg, Robinson & Capel** **Cure (Canada) Ltd.** Toronto

8. FRAUDULENT CLAIMS. If the Assured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this Insurance shall become void and all claim hereunder shall be forfeited.

### SCHEDULE

The underlying policy/ies hereinbefore mentioned:


See Schedule attached

**A.M.C.C.**



EXHIBIT "B" TO STIPULATION OF FACTS—6b

(Page 8)

(See opposite) 

# SHORT RATE CANCELLATION TABLE

A.M.C.O.


A. For Insurances written for one year:—

Days Insurance in Force	Per cent. of One Year Premium	Days Insurance in Force	Per cent. of One Year Premium
1	5	154-188	58
2	6	157-189	54
3-4	7	161-184	55
5-6	8	165-187	56
7-8	9	168-171	57
9-10	10	173-178	58
11-12	11	176-178	58
13-14	12	179-182	59
15-16	13	183-187	60
17-18	14	188-191	61
19-20	15	193-198	62
21-22	16	197-200	63
23-25	17	201-205	64
26-29	18	206-209	65
30-32	19	210-214	66
33-36	20	215-218	67
37-40	21	219-223	68
41-43	22	224-228	69
44-47	23	229-232	70
48-51	24	233-237	71
52-54	25	238-241	72
55-58	26	243-246	73
59-62	27	247-250	74
63-65	28	251-255	75
66-69	29	256-260	76
70-73	30	261-264	77
74-76	31	265-269	78
77-80	32	270-273	79
81-83	33	274-278	80
84-87	34	279-282	81
88-91	35	283-287	82
92-94	36	288-291	83
95-98	37	292-296	84
99-102	38	297-301	85
103-105	39	302-305	86
		(10 months).....	87

44-47	23	229-232	71
48-51	24	233-237	72
52-54	25	238-241	73
55-58	26	242-246	74
59-62 (2 months)	27	247-250	75
63-65	28	251-255	76
66-69	29	256-260	77
70-73	30	261-264	78
74-76	31	265-269	79
77-80	32	270-273	80
81-83	33	274-278	81
84-87	34	279-282	82
88-91 (3 months)	35	283-287	83
92-94	36	288-291	84
95-98	37	292-296	85
99-102	38	297-301	86
103-105	39	302-305	87
106-109	40	306-310	88
110-113	41	311-314	89
114-116	42	315-319	90
117-120	43	320-323	91
121-124 (4 months)	44	324-328	92
125-127	45	329-332	93
128-131	46	333-337	94
132-135	47	338-342	95
136-138	48	343-346	96
139-142	49	347-351	97
143-146	50	352-355	98
147-149	51	356-360	99
150-153 (5 months)	52	361-365	100
		(12 months)	

**B. For Insurances written for more or less than one year:—**

1. If insurance has been in force for 12 months or less, apply the standard short rate table for annual insurances to the full annual premium determined as for an insurance written for a term of one year.
2. If insurance has been in force for more than 12 months;
  - (a) Determine full annual premium as for an insurance written for a term of one year.
  - (b) Deduct such premium from the full insurance premium, and on the remainder calculate the *pro rata* earned premium on the basis of the ratio of the length of time beyond one year the insurance has been in force to the length of time beyond one year for which the insurance was originally written.
  - (c) Add premium produced in accordance with items (a) and (b) to obtain earned premium during full period insurance has been in force.

**EXHIBIT "B" TO STIPULATION OF FACTS—6b****(Page 9)****(See opposite) **

## **SERVICE OF SUIT CLAUSE (U.S.A.)**

*(Approved by Lloyd's Underwriters' Fire and Non-Marine Association.)*

It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the insured (or reinsured), will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

It is further agreed that service of process in such suit may be made upon

**Messrs. Mendes & Mount,**

**27 William Street, New York 5, New York**

, and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the insured (or reinsured) to give a written undertaking to the insured (or reinsured) that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the insured (or reinsured) or any beneficiary hereunder arising out of this contract of insurance (or reinsurance), and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

---

Printed at Lloyd's, London, England.

22/5/62

N.M.A. 772

U.S.A.

**TAX CLAUSE.**

*(Approved by Lloyd's Underwriters' Fire and Non-Marine Association.)*

It is understood and agreed that in the event of any return of premium becoming due hereunder the Underwriters will deduct from the amount of the return the same percentage as the allowance which they have made towards the Federal Stamp Tax.

Nevertheless where such return of premium becomes due owing to the cancellation hereof by Underwriters the above deduction of the tax allowance shall not be made except in so far as the Assured has a right to recover the tax from the U.S. Government.

---

Printed at Lloyd's, London, England.

15/11/88

N.M.A. 1086



**U.S.A.**

**TAX PAID CLAUSE.**

*(Approved by Lloyd's Underwriters' Fire and Non-Marine Association.)*

Notice is hereby given that the Underwriters have agreed to allow for the purpose of purchasing U.S. Government Stamps for attachment hereto **Four** per cent. of the premium payable hereon to the extent such premium is subject to Federal Stamp Tax.

---

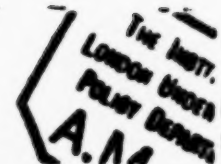
Printed at Lloyd's, London, England.

15/11/56

N.M.A. 1057

**CLAIM NOTIFICATION CLAUSE (U.S.A.)**

*(Approved by Lloyd's Underwriters' Fire and Non-Marine Association.)*



The Assured upon knowledge of any occurrence likely to give rise to a claim hereunder shall give immediate advice thereof to the Underwriters through

Hogg Robinson & Capel Cure (Canada) Ltd.,



~~which shall be the responsibility of the Assured.~~ when Underwriters will appoint an approved Adjuster

to assess the loss on behalf of Underwriters.

Printed at Lloyd's, London, England.

14/12/44

N.M.A. 358

U.S.A.

**NUCLEAR INCIDENT EXCLUSION CLAUSE—LIABILITY—DIRECT (BROAD)**

*(Approved by Lloyd's Underwriters Fire and Non-Marine Association)*

*For attachment to insurances of the following classifications in the U.S.A., its Territories and Possessions, Puerto Rico and the Canal Zone:—*

*Owners, Landlords and Tenants Liability, Contractual Liability, Elevator Liability, Owners or Contractors (including railroad) Protective Liability, Manufacturers and Contractors Liability, Product Liability, Professional and Malpractice Liability, Storekeepers Liability, Garage Liability, Automobile Liability,*

*not being insurances of the classifications to which the Nuclear Incident Exclusion Clause—Liability—Direct (Limited) applies.*

This policy\*

does not apply:—

(a) to injury, sickness, disease, death or destruction with respect to which an insured under the policy is also an insured under a contract of nuclear energy liability insurance issued by the Nuclear Energy Liability Insurance Association or the Mutual Atomic Energy Liability Underwriters and in effect at the time of the occurrence resulting in such injury, sickness, disease, death or destruction; provided such contract of nuclear energy liability insurance shall be deemed to be in effect at the time of such occurrence notwithstanding such contract has terminated upon exhaustion of its limit of liability;

(b) to the ownership, maintenance, operation or use of a nuclear facility by or on behalf of an insured, with respect to injury, sickness, disease, death or destruction resulting from the nuclear energy hazard; provided that except for byproduct material, this paragraph (b) shall not apply to goods or products manufactured or handled by a nuclear facility owned, maintained, operated or used by or on behalf of an insured while such goods or products are away from such facility after sale or distribution to others;

(c) to the furnishing of services, materials, parts or equipment by an insured in connection with the planning, construction, maintenance, operation or use of any nuclear facility, (1) with respect to injury to or destruction of any nuclear facility or property thereof resulting from the nuclear energy hazard or (2) if the nuclear facility is located outside the United States of America, its territories or possessions, or Canada, with respect to injury, sickness, disease, death or destruction resulting from the nuclear energy hazard;

(d) to the transportation, handling, use, sale, distribution, or disposal of byproduct material, with respect to injury, sickness, disease, death or destruction resulting from the nuclear energy hazard.

As used herein:

1. The term "nuclear energy hazard" means the radioactive, toxic, explosive or other hazardous properties of source material, special nuclear material or byproduct material.

(b) to the ownership, maintenance, operation or use of a nuclear facility by or on behalf of an insured, with respect to injury, sickness, disease, death or destruction resulting from the nuclear energy hazard; provided that except for byproduct material, this paragraph (b) shall not apply to goods or products manufactured or handled by a nuclear facility owned, maintained, operated or used by or on behalf of an insured while such goods or products are away from such facility after sale or distribution to others;

(c) to the furnishing of services, materials, parts or equipment by an insured in connection with the planning, construction, maintenance, operation or use of any nuclear facility, (1) with respect to injury to or destruction of any nuclear facility or property thereof resulting from the nuclear energy hazard or (2) if the nuclear facility is located outside the United States of America, its territories or possessions, or Canada, with respect to injury, sickness, disease, death or destruction resulting from the nuclear energy hazard;

(d) to the transportation, handling, use, sale, distribution, or disposal of byproduct material, with respect to injury, sickness, disease, death or destruction resulting from the nuclear energy hazard.

As used herein:

1. The term "nuclear energy hazard" means the radioactive, toxic, explosive or other hazardous properties of source material, special nuclear material or byproduct material.

2. The terms "source material", "special nuclear material" and "byproduct material" shall have the meanings given them in the Atomic Energy Act of 1954 or by any law amendatory thereof; provided, except for byproduct material (a) contained in or combined with special nuclear material or (b) held, stored, transported or disposed of as waste by or on behalf of a nuclear facility, "byproduct material" shall not include any radioactive isotope away from a nuclear facility.

3. The term "nuclear facility" means:

(a) any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

(b) any equipment or device (i) designed or used for the separation of the isotopes of uranium or plutonium, (ii) designed or used for the processing, fabricating or alloying of special nuclear material or of irradiated materials containing special nuclear material, (iii) incorporating or making use of such irradiated materials, or (iv) designed or used for processing waste byproduct material;

(c) any structure, basin, excavation, premises or place prepared or used for the storage or disposal of waste source material or waste consisting of or containing special nuclear material or byproduct material;

and includes the site on which any of the foregoing is located, together with all operations conducted thereon and all premises used for such operations. Subdivision (ii) of paragraph (b) foregoing is not applicable to the occasional mechanical processing or fabricating of special nuclear material by any person or organization at a location which contains no equipment, device or apparatus otherwise defined herein as a nuclear facility, where special nuclear or byproduct material is not regularly handled, stored, or disposed of as waste, and which is principally used for other operations not related to the handling, fabricating or use of special nuclear material.

4. With respect to injury to or destruction of property, the word "injury" or "destruction" includes all forms of radioactive contamination of property.


It is understood and agreed that, except as specifically provided in the foregoing to the contrary, this clause is subject to the terms, exclusions, conditions and limitations of the Policy to which it is attached.

\*Note:—As respects policies which afford liability coverages and other forms of coverage in addition, the words underlined should be amended to designate the liability coverages to which this clause is to apply.

[illegible]

## EXHIBIT "B" TO STIPULATION OF FACTS—6b

(Page 10)

(See opposite) 



**J (A) FORM**

In all communications please quote  
the following reference

**542**

59/137085

**The Institute of London Underwriters**  
**Companies Combined Policy**




This Policy is subscribed by Insurance Companies  
Members of The Institute of London Underwriters,  
40, Lime Street,  
London, E.C.3.

TODD SHIPYARDS CORPORATION

## EXHIBIT "B" TO STIPULATION OF FACTS—7a

(Page 1)

(See opposite) 

No Policy or at Contract dated on or after 1st Jan., 1924, All be recognized by the Committee of Lloyd's as entitling the holder to the benefit of the Funds and/or Guarantees lodged by the Underwriters of the Policy or Contract as security for their liabilities unless it bears at foot the Seal of Lloyd's Policy Signing Office.

53293 - 2 JAN 1959



Any person not an Underwriting Member of Lloyd's subscribing this Policy, or any person uttering the name if so subscribed, will be liable to be proceeded against under Lloyd's Acts.

S.G.

£

Printed at Lloyd's, London, England.  
19-4-58

## Be it known that

as well in their own Name as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may or shall appertain, in part or in all, doth make Assurance and cause themselves and them and every of them to be insured, lost or not lost, at and from



upon any kind of Goods and Merchandises and also the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture of and in the good Ship or Vessel called the

whereof is Master, under God, for this present Voyage or whosoever else shall go for Master in the said Ship or by whatsoever other Name or Names the same Ship, or the Master thereof, is or shall be named or called, beginning the Adventure upon the said Goods and Merchandises from the loading thereof aboard the said Ship as above and shall so continue and endure during upon the said Ship, &c., as above her Abode there, upon the said Ship, &c.; and further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c. and Goods and Merchandises whatsoever, shall be arrived at as above upon the said Ship, &c. until she hath moored at Anchor Twenty-four Hours in good Safety and upon the Goods and Merchandises until the same be there discharged and safely landed; and it shall be lawful for the said Ship, &c. in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever and whosoever for all purposes without Prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured by Agreement between the Assured and the Assurers in this Policy, are and shall be valued at

with, together with everything value at  
valued at the sum of U.S. \$500,000

subject to the conditions of the Institute Time Clause and Port Clause and clauses attached.

Covering risks whilst the vessel is confined to Galveston Harbour, whilst under repair, or held covered at a rate to be agreed.

WITH, WITHOUT OR WITHOUT... and everything  
... ..

value: at  
U.S. \$200,000

... ..  
... ..

Covering risks whilst the vessel is confined to Galveston Harbour,  
whilst under repair, or held covered at a rate to be agreed.

**Touching** the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprises, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Goods and Merchandises and Ship, &c. or any Part thereof; and in case of any Loss or Misfortune it shall be lawful to the Assured, their Factors, Servants and Assigns, to sue, labour and travel for, in and about the Defence, Safeguard and Recovery of the said Goods and Merchandises and Ship, &c. or any Part thereof without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his Sum herein assured. And it is especially declared and agreed that no acts of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street or in the Royal Exchange or elsewhere in London.

*Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereof; also from the consequences of hostilities or warlike operations, whether there be a declaration of war or not; but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power.*

*Further warranted free from the consequences of civil war, revolution, rebellion, insurrection or civil strife arising therefrom, or piracy.*

And so we, the Assurers, are contented and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors and Assigns to the Assured, their Executors, Administrators and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured

at and after the Rate of **TWENTY AND ONE THIRD CENTS PER CENT.**

**IN WITNESS** whereof we, the Assurers, have subscribed our Names and Sums assured in **LONDON**, **15th May 1908**, as hereinafter appears.

**N.B.**—Corn, Fish, Salt, Fruit, Flour and Seed are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides and Skins are warranted free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent. unless general or the Ship be stranded.

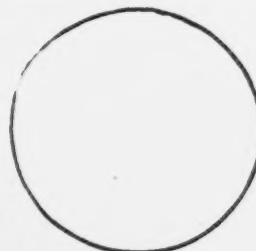
**Now know Ye** that We, the Assurers, members of the Syndicate(s) whose definitive Number(s) in the attached list are set out in the Table overleaf, or attached overleaf, hereby bind Ourselves, each for his own part and not one for another, and in respect of his due proportion only, to pay or make good to the Assured all such Loss and/or Damage which he or they may sustain by any one or more of the aforesaid perils, and so that the due proportion for which each of us the Assurers is liable shall be ascertained by reference to his proportion as ascertained according to the said List of the Amount, Percentage or Proportion of the total Sum assured which is in the said Table set opposite the definitive Number of the Syndicate of which such Assurer is a member.

**IN WITNESS** whereof the Manager of Lloyd's Policy Signing Office has subscribed his Name on behalf of each of Us.

**LLOYD'S POLICY SIGNING OFFICE.**

*[Signature]*

**MANAGER.**



## EXHIBIT "B" TO STIPULATION OF FACTS—7a

(Page 2)

(See opposite) 

**Definitive Numbers of the Syndicates and Amount, Percentage or Proportion of the  
Total Amount insured shared between the Members of those Syndicates.**

AMOUNT, PERCENTAGE OR PROPORTION	Syndicate No.	L.P.S.O. SLP No.	L.P.S.O. DATE	AMOUNT, PERCENTAGE OR PROPORTION	Syndicate No.	L.P.S.O. SLP No.	L.P.S.O. DATE
PER CENT	5725	3290	2 159		5725	3290	2 159
	SYNDICATE				SYNDICATE		
3.6000	172	11	2313	.8000	753P	13	
.2000	42	11	2313	.6400	455A	7 56	PORT
.2000	1422	11	2313	.1600	456A	7 56	PORT
4.0000	4483	7 56	1150	.2000	2225	20	
.4608	263A	7 56		.6000	477T	3	
1.7280	450A	7 56		.8000	6975	7 56	
.3456	902A	7 56		1.0000	483A	04H	
.3456	949A	7 56		.2000	136A	04H	
.3200	158A	7 56		.4000	654P	ORT NE	
2.4000	656	145 3 7 56		.4000	6255	7 56	3546
4.0000	368J	H 25		.2000	6125	7 56	3546
3.2000	108A	251		.4000	2323	580	
.4000	101A	251		.2000	2303	540	
1.9200	185A	7 56	LY/44	.3200	12H		
.1920	187A	7 56	LY/44	.0800	127		
.2880	2A	7 56	LY/44	.6000	3582	H0 F	
3.2000	418A	7 56	2490	.4000	5350	OVER 1698	
.2000	421A	7 56	2490	.3000	473A	1/2H	
2.8800	93A			.3000	2646	9 56 40	
.3200	941			.4000	3H05	8/HCH56	
1.6000	6212	439		.4000	725P	ORT 16057	
1.6000	274A	7 56					
1.6000	711H	0					
1.6000	7646	405					
1.6000	785H	29					
2.0000	995A	7 56	AH/5				

AMOUNT, PERCENTAGE OR PROPORTION

Syndicate No.

L.P.S.O. SLP No.

L.P.S.O. DATE

5725 3290 2 159



1.6000	5212449
1.6000	2744 7 56
1.6000	7111 0
1.6000	7646 405
1.6000	7151 29
2.0000	9954 7 56 AH/5

1.6000 1.6000 1.6000

AMOUNT, PERCENTAGE OR PROPORTION

RECEIPT NO. LPSO REP NO. LPSO DATE

53249 2 15

SYNDICATE


UNDERWRITER'S REFERENCE

1.6000	2494 7 56	43104
1.2000	115104	
1.3200	2135057	4 7
.4200	2065057	4 7
.5600	2035057	4 7
.5000	2075057	4 7
1.2400	7074 7 56	4337
.1200	7104 7 56	4337
.2400	7244 7 56	4337
1.1200	114078	PORT
.2400	111078	PORT
.2400	3194 7 56	
1.2000	284 7 56	
.8000	329	
.8000	5401950	
.8000	4644 7 56	
1.2000	3047147	
.8000	50N7F	
.4000	51N7F	
1.2000	493547	
2.0000	4384 7 56	4F3
.6400	4754 7 56	2528
.0800	4784 7 56	2528
.0800	2444 7 56	2528
.6000	4984 7 56	
.4000	314 1 56	

23

EXHIBIT "B" TO STIPULATION OF FACTS—7a

(Page 3)

(See opposite) 

2

A. The place of physical and actual issue and delivery of this policy is the City of London. Nevertheless (at the option of the Assured) as between the Assured and the Assurers the place of issue and delivery of the policy shall be considered the City of New York and all matters arising hereunder shall be determined in accordance with American law and practice. Any suit hereon may be brought against these Assurers in any Court of competent jurisdiction within the United States of America. The summons and other legal processes may be served on this Company by and in behalf of the Assured by mailing a copy thereof by United States registered mail addressed to Mr. Russell T. Mount, Mr. Wilbur H. Hecht or Mr. Frank A. Bull, all of the Law firm of Mendes & Mount, 27, William Street, New York 5, N.Y., each of whom this Company hereby authorizes to accept by and in its behalf such summons and other legal processes against this Company in any Court of competent jurisdiction within the United States of America. The mailing, as herein provided of such summons or other legal process shall be deemed personal service and accepted by this Company as such, and shall be legal and binding upon this Company for all the purposes of the suit. Final judgment against this Company in any such suit shall be conclusive; and it may be enforced in any other jurisdictions, including Great Britain, by suit on the judgment, a certified or exemplified copy of which shall be conclusive evidence of the fact and of the amount of this indebtedness. The right of the Assured to bring suit as provided herein shall be limited to a suit brought in its own name and for its own account. For the purposes of suit as herein provided the word "Assured" includes any mortgagee under a ship mortgage and any person succeeding to the rights of any such mortgagee.

The following clause to apply only if this Insurance is affected by the New York State Insurance Law :-

"Underwriters hereon hereby designate the Superintendent of Insurance of the State of New York or his successor in office their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the (re) insured or any beneficiary hereunder arising out of this contract of (re) insurance."

1105.

B. The Assured shall be directly liable to the Assurer for all premiums under this policy. If payment of premium is not made by the Assured within 10 days after attachment of the Insurance, or, in the event the Assurers shall have agreed to accept deferred payments, if any payment of premium is not made on the day agreed, this policy may be cancelled by the Assurer giving to the Assured named herein five days' notice of such cancellation. A written and/or telegraphic notice by or through the brokers, or their American Correspondents who negotiated the insurance, to said Assured at his last known address shall constitute a complete notice as required under this clause. Such cancellation shall be without prejudice to premiums earned and due for the period the policy is in force.

No. 135.

1026

W. F. & D., Ltd. 8.10.57.

Where in accordance with established local practice the assured or the charterer enters into towage contracts under which the assured or the Charterer assumes liability for any damages resulting from collision of the vessel insured with another ship or vessel, including the towing vessel, and agrees to indemnify the tow-boat and/or her owners, charterers, operators, managers, agents and/or pilots against loss or liability for any such damage, it is agreed that amounts paid by the assured or charterer pursuant to such agreement, in respect of such damage caused by collision between the vessel insured and any other ship or vessel, shall be deemed payments "by way of damages to any other person or persons" within the meaning of the Collision Clause in this policy to the extent that such payments would have been covered under the said Collision Clause if the insured vessel had been responsible for the damage in the absence of any agreement.

1163. W.O. 13.2.58.

It is understood and agreed that the F. C. & S. Clause in the attached Form is hereby deleted and the following Clause :—

Unless physically deleted by the Underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provision of the Policy :

#### F. C. & S. CLAUSE.

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise ; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), but the foregoing shall not exclude collision, explosion or contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power, and for the purpose of this warranty " power " includes any authority maintaining naval, military or air forces in association with a power ; also warranted free, whether in time of peace or war, from all loss, damage or expense caused by any weapon of war employing atomic fission or radioactive force. Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

is substituted therefor.

1104-17.11.55.

148

5R

This insurance is subject to terms and conditions of so-called London Institute Time Charter Party Form 1-9 May 1950 C. 1. 92 Form with the following amendments and additions:—

#### AMENDMENTS

1. Delete Clauses (20) and (22) and substitute the following:—

(20) "This insurance also covers damage to or destruction of the property insured directly caused by strikers, locked out workmen or persons taking part in labour disturbances or riots or civil commotions or caused by vandalism, sabotage or malicious mischief, but excluding civil war, revolution, rebellion or insurrection, or civil strife arising therefrom, and warranted free from any claim for delay, detention or loss of use, and free from all loss of damage caused by any weapon of war employing atomic fission or radioactive force.

"Notwithstanding the exclusions in the F. C. & S. Clause in the within policy, 'vandalism,' 'sabotage' and 'malicious mischief,' as used herein, shall be construed to include wilful or malicious physical injury to or destruction of the described property caused by acts committed by an agent of any Government party or faction engaged in war, hostilities or other warlike operations, provided such agent is acting secretly and not in connection with any operations of military or naval armed forces in the country where the described property is situated."

(22) "Including loss or damage caused by earthquake, volcanic eruption or tidal wave arising therefrom."

2. Substitute the following American Institute F. C. & S. Clause for Clauses 19 and 21:—

#### F. C. & S. CLAUSE.

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), but the foregoing shall not exclude collision, explosion or contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power, and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power; also warranted free, whether in time of peace or war, from all loss or damage caused by any weapon of war employing atomic fission or radioactive force. Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

3. Add the words "or the surety for them in consequence of their undertaking" in line 2 after the word "thereof"

4. Delete Clauses 3, 4 and 5.

5. Delete Clause 9 and substitute the following:—

9. General Average, Salvage and Special Charges payable as provided in the contract of affreightment, or failing such provision, or there be no contract of affreightment, payable in accordance with the laws and usages of the Port of New York. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid in accordance with same.

6. Delete Clause 8 and substitute the following:—

This insurance also specially to cover (subject to the Average Warranty) loss of or damage to the subject matter insured directly caused by the following:—

Accidents in loading, discharging or handling cargo, or in bunkering;

Accidents in going on or off, or while on drydocks, graving docks, ways, griddons or pontoons;

Explosions on shipboard or elsewhere;

Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull (excluding the cost and expense of replacing or repairing the defective part);

Contact with Aircraft or with any land conveyance;

Negligence of Charterers and/or Repairers, ~~other than on Armed~~, Master, Mariners, Engineers or Pilots;

Provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them. Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel.



6. Delete Clause 8 and substitute the following:—

This insurance also specially to cover (subject to the Average Warranty) loss of or damage to the subject matter insured directly caused by the following:—

Accidents in loading, discharging or handling cargo, or in bunkering;

Accidents in going on or off, or while on drydocks, graving docks, ways, griddons or pontoons;

Explosions on shipboard or elsewhere;

Breakdown of motor generators or other electrical machinery and electrical connections thereto, bursting of boilers, breakage of shafts, or any latent defect in the machinery or hull (excluding the cost and expense of replacing or repairing the defective part);

Contact with Aircraft or with any land conveyance;

Negligence of Charterers and/or Repairers, ~~other than the Assured~~, Master, Mariners, Engineers or Pilots.


Provided such loss or damage has not resulted from want of due diligence by the Assured, the Owners or Managers of the Vessel, or any of them. Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel.

#### GENERAL ADDITIONS

7. To cover all risks of entering while in or on and leaving graving docks, dry docks, and any other facilities in or on which the vessel is not waterborne in whole or in part.
8. When the contributory value of the vessel is greater than the valuation herein the liability of these Underwriters for General Average contribution (except in respect to amount made good to the Vessel) or Salvage shall not exceed that proportion of the total contribution due from the Vessel that the amount insured hereunder bears to the contributory value; and if because of damage for which these Underwriters are liable as Particular Average the value of the Vessel has been reduced for the purpose of contribution, the amount of the Particular Average claim under this Policy shall be deducted from the amount insured hereunder and these Underwriters shall be liable only for the proportion which such net amount bears to the contributory value.
9. In the event of expenditure for Salvage, Salvage Charges or under the Sue and Labour Clause, this Policy shall only be liable for its share of such proportion of the amount chargeable to the property hereby insured as the insured value, less loss and/or damage, if any, for which the Underwriters are liable bears to the value of the salvaged property. Provided that where there are no proceeds or there are expenses in excess of the proceeds, the expenses, or the excess of the expenses, as the case may be, shall be apportioned upon the basis of the sound value of the property at the time of the accident and this Policy without any deduction for loss and/or damage shall bear its *pro rata* share of such expenses or excess of expenses accordingly.
10. In respect of the vessel insured hereunder, it is agreed that this policy also covers the Assured and affiliated companies of the Assured be they owners, subsidiaries or inter-related companies and as bareboat charterers and/or charterers and/or sub-charterers and/or any operators and/or in whatever capacity, and shall so continue to cover notwithstanding the provisions of this policy with respect to change of ownership or management, but the term "Assured" in the Inchmaree Clause shall not include such charterers except bareboat charterers. Provided, however, that in the event of any claim being made by any affiliated, subsidiary or inter-related company under this clause it shall not be entitled to recover in respect of any liability to which it would not be subject if it were the owner of the vessel, nor to a greater extent than an owner would be entitled in such event to recover. It is further agreed that these insurers waive any right of subrogation against any subsidiary, affiliated or inter-related company of the Assured, excepting to the extent that any such company is insured against the liability asserted. However, should the vessel be sold to or transferred to or chartered on a bareboat basis to others than the Assured or the affiliated companies of the Assured, or be requisitioned on a bareboat basis the provisions of this policy with respect to change of ownership or management shall govern.
11. It is agreed that the equipment of the vessel shall include bar stores, equipment for passengers' amusements, saloon and passenger cabin fittings, equipment, furnishings and decorations, as well as spare bunkers and all other stores and supplies, including stocks in shops, provided the same are owned by the assured.
12. Radio apparatus and equipment and other apparatus or equipment used for the purpose of communication or as aids to Navigation or safety devices, also equipment consisting of projection machines, sound apparatus and motion picture film shall be covered by this policy and included within the agreed valuation of the hull, even when not owned by the assured, provided the assured has assumed liability therefor; but the liability of Underwriters (either as to amount or as to the risks covered) shall not exceed the assured's liability or liability to which Underwriters would be subject, if the property were fully owned by the assured, whichever shall be least.
13. There shall be no rights of subrogation against the United States of America insofar as its interest (if any) in the insured vessel is concerned, but the right of subrogation shall exist against the United States of America as Owner of any other vessel or property to the same extent as though it were not named as an Assured in this policy.
14. Where in accordance with established local practice the assured or the charterer enters into towage contracts under which the assured or the charterer assumes liability for any damages resulting from collision of the vessel insured with another ship or vessel, including the towing vessel, and agrees to indemnify the towboat and/or her owners against loss or liability for any such damage, it is agreed that amounts paid by the assured or charterer pursuant to such agreement in respect of such damage caused by collision between the vessel insured and any other ship or vessel, shall be deemed payments "by or for the assured" of damages to any other person or persons within the meaning of the Collision Clause in this policy to the extent that such payments would have been covered under the said Collision Clause if the insured vessel had been responsible for the damage in the absence of any agreement.
15. It is hereby understood and agreed that the term "new management" in the Change of Ownership Clauses refers only to the transfer of the management of the vessel insured from one firm or corporation who have been managing the vessel to another and has no reference to any internal changes in the offices of the assured.

EXHIBIT "B" TO STIPULATION OF FACTS—7a

(Page 4)

(See opposite) 

# **SPECIAL CONDITIONS**


16. This policy covers, as if separately insured, liability for Protection and Indemnity risks as defined in 1956 Group Certificate of Entry issued by Messrs. Thomas R. Miller & Son with exclusion in Paragraph 1 (a) of said certificate deleted.  
It is especially agreed that this Protection and Indemnity extension shall pay the expenses of the removal of the wreck of the insured vessel from any place owned, leased or occupied by the Assured.
17. Privilege to overhaul, outfit, recondition, reconvert and make additions, alterations and repairs and to make trial trips (either within or without the port) but trial trips outside the port to be subject to additional premium, if required.
18. During any period the vessel is under repair it is agreed that this insurance extends to include any additional protection which the Assured would receive if the vessel were insured subject to Institute Clauses for Builders Risks 29th April 1937 (L13).
19. This insurance (subject to notice to Underwriters when risk is declared hereunder) shall, if required, extend to include the interest of any repairer who shall be considered as an additional Assured hereunder, and the right of subrogation against such repairer and such repairer's legal liability Underwriters is waived hereunder.
20. It is agreed that this insurance covers machinery, equipment and anything and everything owned by the Assured and intended for the vessel or which was on the vessel and are stored on docks and/or elsewhere on shore and while overhauling, repairing or installing same.
21. The Assured shall not be prejudiced by any agreement limiting or exempting the liability of tugs and/or towboats and/or their owners when the assured is compelled to accept such contracts.
22. Privilege to hold cargo aboard and to load and/or discharge cargo.
23. Held covered for trip other ports (in tow or otherwise) at an additional premium to be agreed.
24. In the event of a total loss or constructive total loss from the time of the attachment of this policy to the expiration of same, the amount payable under this policy shall be the amount stated herein plus this policy's proportion of any salvage and special charges and sue and labour expenses.
25. Seaworthiness of vessel admitted.
26. When any vessel insured hereunder requires war risks coverage (same to be specifically declared hereunder) or proceeds outside port limits, this insurance shall (at an additional premium to be agreed) extend to cover war etc. risks as per War Risks Clauses—Hulls (September 1956) limit 3 months, or longer periods provided that 7 days' notice of cancellation can be given by either underwriters or owners which notice shall be given prior to the expiry of any 3 months period, and in the event of notice being given under this clause 5 days prior notice of such cancellation shall be given to the United States Department of Commerce, Maritime Administration—attention, Chief, Division of Insurance, at Washington 25, D.C.—if they are interested in the insurance also the liability of the Assured for Protection and Indemnity risks as excluded by the F. C. & S. Clause in the Group Certificate of Entry hereinbefore referred to including Strikes, Riots and Civil Commotions and liability for contractual repatriation expenses of any member of the crew. In the event of the loss or shipwreck of the vessel from any cause, this insurance shall continue in force subject to an additional premium, if so required by Underwriters, until the crew shall be either discharged or landed at the port of signing on.  
The Hull War Risk Clauses referred to above are modified by the deletion of the clause reading:  
"Warranted free of any claims arising from capture, seizure, arrest, restraint, detainment, preemption, confiscation or requisition by the Government of the United States or of the country in which the vessel is owned or registered,"  
and the following clause substituted therefor:—  
"Warranted free from any claim arising from requisition or preemption by the country in which the vessel is owned or registered or to which the owner is committed by any understanding or agreement with respect to use or title in the event of an emergency"
27. Covering whilst in port at which declared, with privilege to move in tow or otherwise within port limits; trips to other ports held covered as elsewhere herein provided and this insurance to continue after arrival at such other ports.

If the vessel insured hereunder is bareboat chartered from the United States of America the following clauses (Nos. 1, 2 and 3) shall apply:

1. There shall be no rights of subrogation against the United States of America insofar as its interest in the insured vessel is concerned but the right of subrogation shall exist against the United States of America as Owner of any other vessel or property to the same extent as though it were not named as an Assured in this policy.
2. In the event of damage for which this policy would be liable and the exercise by the Owner of any option given in the Charter Party to accept redelivery of the vessel unrepaired, these Assurers agree to settle their respective proportions of claim for such damage on the basis of the estimated cost of such repairs at the prices current at the time of redelivery, this cost to be determined by surveyors representing the various parties interested or by a surveyor satisfactory to all of such parties.
3. Privilege of pro rata daily cancellation in event charter terminated.

EXHIBIT "B" TO STIPULATION OF FACTS—7a

(Page 5)

(See opposite) 

# INSTITUTE TIME CLAUSES. HULLS—PORT RISKS.

1. It is further agreed that if the Vessel hereby insured shall come into collision with any other vessel and the Assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, the Underwriters will pay the Assured such proportion of such sum or sums as paid as their respective subscriptions hereto bear to the value of the Vessel hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of the value of the Vessel hereby insured, and in cases in which the liability of the Vessel has been contested, or proceedings have been taken to limit liability with the consent in writing of the Underwriters, they will also pay a like proportion of the costs which the Assured shall thereby incur or be compelled to pay; but when both vessels are to blame, then unless the liability of the Owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross liabilities as if the Owners of each vessel had been compelled to pay to the Owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision.

2. Should the Vessel hereby insured come into collision with or receive salvage services from another vessel belonging wholly or in part to the same Owners or under the same management, the Assured shall have the same rights under this Policy as they would have were the other vessel entirely the property of Owners not interested in the Vessel hereby insured; but in such cases the liability for the collision or the amount payable for the services rendered shall be referred to a sole arbitrator to be agreed upon between the Underwriters and the Assured.

3. It is further agreed that if by reason of interest in the Vessel the Assured shall become liable to pay and shall pay any sum or sums in respect of any liability, claim, demand, damages, and/or expenses arising from or occasioned by any of the following matters or things during the currency of this Policy, that is to say:—

Loss of or damage to any other vessel or goods, merchandises, freight, or other things or interests whatsoever, on board such other vessel, caused proximately or otherwise by the Vessel insured in so far as the same is not covered by Clause 1:

Loss of or damage to any goods, merchandises, freight, or other things or interest whatsoever, other than as aforesaid (not being property on board the insured Vessel and owned by builders or repairers or for which they may be responsible), whether on board the insured Vessel or not, which may arise from any cause whatsoever:

Loss of or damage to any harbour, dock (graving or otherwise), wharf, way, gridiron, pontoon, pier, quay, jetty, stage, buoy, telegraph cable or other fixed or movable thing whatsoever, or to any goods or property in or on the same however caused:

Any attempted or actual raising, removal, or destruction of the wreck of the insured Vessel or the cargo thereof, or any neglect or failure to raise, remove, or destroy the same:

Loss of life, personal injury, illness or payments made for life salvage: Any sum or sums for which the Assured may become liable or incur from causes not heretofore specified, but which are absolutely or conditionally recoverable from or undertaken by the United Kingdom Mutual Steamship Assurance Association Limited:

The Underwriters will pay the Assured such proportion of such sum or sums as paid, or which may be required to indemnify the Assured for such loss, as their respective subscriptions bear to the insured value of the Vessel hereby insured, provided always that the liability under this clause, together with any liability there may be under Clause 4, in respect of any one accident or series of accidents arising out of the same event, shall be limited to the sum hereby insured, but when the liability of the Assured has been contested with the consent in writing of the Underwriters, the Underwriters will also pay a like proportion of the costs which the Assured shall thereby incur or be compelled to pay.

4. This insurance also to pay the expenses, after deduction of the proceeds of the salvage, not recoverable under Clause 3, of the removal of the wreck of the insured Vessel from any place owned, leased or occupied by the Assured. Underwriters' liability under this clause is subject to the limitations in amount provided in Clause 5. The provisions of that clause regarding the payment of legal costs shall also apply hereto.

5. General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment if any contained no special terms upon the subject; but where the contract of affreightment so provides the adjustment shall be according to York-Antwerp Rules.

6. Held covered in case of deviation or change of voyage, provided notice be given immediately after receipt of advice and any additional premiums required be agreed.

7. (a) In the event of expenses being incurred pursuant to the Suing and Labouring Clause, the liability under this Policy shall not exceed the proportion of such expenses that the amount insured hereunder bears to the value of the Vessel as stated herein, or to the sound value of the Vessel at the time of the occurrence giving rise to the expenditure if the sound value exceeds that value. Where Underwriters have admitted a claim for total loss and property insured by this Policy is saved, the foregoing provisions shall not apply unless the expenses of suing and labouring exceed the value of such property saved and then shall apply only to the amount of the expenses which is in excess of such value.

(b) Where a claim for total loss of the Vessel is admitted under this Policy and expenses have been reasonably incurred in saving or attempting to save the Vessel and other property and there are no proceeds, or the expenses exceed the proceeds, then this Policy shall bear its pro rata share of such proportion of the expenses, or of the expenses in excess of the proceeds, as the case may be, as may reasonably be regarded as having been incurred in respect of the Vessel; but if the Vessel be insured for less than its sound value at the time of the occurrence giving rise to the expenditure, the amount recoverable under this clause shall be reduced in proportion to the under-insurance.

8. Average payable irrespective of percentage and without deduction, new for old, whether the average be particular or general.

9. No claim shall in any case be allowed in respect of scraping or painting the Vessel's bottom.

10. In no case shall Underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the period covered by this Policy.

11. In ascertaining whether the Vessel is a constructive total loss the insured value shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account. No claim for constructive total loss based upon the cost of recovery and/or repair of the Vessel shall be recoverable hereunder unless such cost would exceed the insured value.

12. In the event of accident whereby loss or damage may result in a claim under this Policy, notice shall be given to Underwriters prior to survey and also, if the Vessel is abroad, to the nearest Lloyd's Agent so that a surveyor may be appointed to represent Underwriters should they so desire. Underwriters shall be entitled to decide the port to which the Vessel shall proceed for docking or repair (the actual additional expense of the voyage arising from compliance with Underwriters' requirements being refunded to the Assured) and shall have a right of veto concerning a place of repair or a repairing firm. Underwriters may also take tenders or may require tenders to be taken for the repair of the Vessel. Where a tender as taken is accepted with the approval of Underwriters an allowance shall be made at the rate of 50% per annum on the insured value for time lost between the dispatch of the invoice to tender and the acceptance of a tender to the extent that such time is lost solely as the result of tenders having been taken and provided that the tender is accepted without delay after receipt of Underwriters' approval.

Due credit shall be given against the allowance as above for any amount recovered:—

(a) In respect of fuel and stores and wages and maintenance of the Master Officers and Crew or any member thereof allowed in general or particular average.

(b) From third parties in respect of damages for detention and/or loss of profit and/or running expenses.

For the period covered by the tender allowance or any part thereof. Where a part of the cost of average repairs other than a fixed deductible franchise is not recoverable from Underwriters the allowance shall be reduced by a similar proportion.

In the event of failure to comply with the conditions of this clause, the



20 2. Should the Vessel hereby insured come into collision with or receive  
21 salvage services from another vessel belonging wholly or in part to the same  
22 Owners or under the same management, the Assured shall have the same  
23 rights under this Policy as they would have were the other vessel entirely the  
24 property of Owners not interested in the Vessel hereby insured; but in such  
25 cases the liability for the collision or the amount payable for the services  
26 rendered shall be referred to a sole arbitrator to be agreed upon between the  
27 Underwriters and the Assured.

28 3. It is further agreed that if by reason of interest in the Vessel the  
29 Assured shall become liable to pay and shall pay any sum or sums in respect  
30 of loss of life, personal injury, illness or expenses arising from or  
31 occasioned by any of the following matters or things during the currency of  
32 this Policy, that is to say:—

33 Loss of or damage to any other vessel or goods, merchandise, freight, or  
34 other things or interests whatsoever, on board such other vessel,  
35 caused proximately or otherwise by the Vessel insured in so far as the  
36 same is not covered by Clause 1:

37 Loss of or damage to any goods, merchandise, freight, or other things  
38 or interest whatsoever, other than as aforesaid (not being property  
39 on board the insured Vessel and owned by builders or repairers or  
40 for which they may be responsible), whether on board the insured  
41 Vessel or not, which may arise from any cause whatsoever:

42 Loss of or damage to any harbour, dock (graving or otherwise), slipway,  
43 way, gridiron, pontoon, pier, quay, jetty, stage, buoy, telegraph  
44 cable or other fixed or movable thing whatsoever, or to any goods  
45 or property in or on the same howsoever caused:

46 Any attempted or actual raising, removal, or destruction of the wreck  
47 of the insured Vessel or the cargo thereof, or any neglect or failure to  
48 raise, remove, or destroy the same:

49 Loss of life, personal injury, illness or payments made for life salvage:  
50 Any sum or sums for which the Assured may become liable or incur  
51 from causes not heretofore specified, but which are absolutely or  
52 conditionally recoverable from or undertaken by the United Kingdom  
53 Mutual Steamship Assurance Association Limited:

54 the Underwriters will pay the Assured such proportion of such sum or sums  
55 so paid, or which may be required to indemnify the Assured for such loss, as  
56 their respective subscriptions bear to the insured value of the Vessel hereby  
57 insured, provided always that the liability under this clause, together with  
58 any liability there may be under Clause 4, in respect of any one accident  
59 or series of accidents arising out of the same event, shall be limited to the  
60 sum hereby insured, but when the liability of the Assured has been contested  
61 with the consent in writing of the Underwriters, the Underwriters will also  
62 pay a like proportion of the costs which the Assured shall thereby incur or  
63 be compelled to pay.

64 4. This insurance also to pay the expenses, after deduction of the pro-  
65 ceeds of the salvage, not recoverable under Clause 3, of the removal of the  
66 wreck of the insured Vessel from any place owned, leased or occupied by the  
67 Assured. Underwriters' liability under this clause is subject to the limitations  
68 in amount provided in Clause 3. The provisions of that clause regarding the  
69 payment of legal costs shall also apply hereto.

70 5. Notwithstanding the provisions of Clauses 3 and 4, this Policy is  
71 warranted free from any claim arising:

72 (a) directly or indirectly under Workmen's Compensation or Employers'  
73 Liability Acts and any other Statutory or Common Law Liability in  
74 respect of accidents to or illness of workmen or any other persons  
75 employed in any capacity whatsoever by the Assured or others in on  
76 or about or in connection with the Vessel hereby insured or her cargo  
77 materials or repairs.

78 (b) in connection with an occurrence resulting from the operation of  
79 a part excepted by,

80 (i) the Free of Capture and Seizure Warranty,  
81 (ii) the Free of Strikes, Riots and Civil Commotions Warranty.

82 6. With leave to proceed to and from any wet or dry docks, harbours,  
83 ways, cradles, and pontoons during the currency of this Policy within the  
84 limits mentioned herein.

85 7. If the Vessel is sold or transferred to new management then unless  
86 the Underwriters agree in writing to continue the insurance this Policy shall  
87 become cancelled from the time of sale or transfer. This clause shall prevail  
88 notwithstanding any provision whether written, typed or printed in the  
89 Policy inconsistent therewith.

90 8. This insurance also specially to cover loss of or damage to the subject  
91 matter insured directly caused by the following:—

92 Accidents in loading, discharging or shifting cargo or fuel  
93 Explosions on ship-board or elsewhere  
94 Bursting of boilers, breakage of shafts or any latent defect in the  
95 machinery or hull  
96 Contact with Aircraft  
97 Negligence of Master Officers Crew or Pilots

98 provided such loss or damage has not resulted from want of due diligence by  
99 the Assured, Owners or Managers

100 Masters Officers Crew or Pilots not to be considered as part Owners within  
101 the meaning of this clause should they hold shares in the Vessel.

102 10. Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereto; also  
103 from the consequences of hostilities or warlike operations, whether there be a declaration of war or not; but this warranty shall not  
104 exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused  
105 directly (and independently of the nature of the voyage or service which the Vessel concerned or, in the case of a collision, any other  
106 vessel involved therein, is performing) by a hostile act by or against a belligerent power; and for the purpose of this warranty "power"  
107 includes any authority maintaining naval, military or air forces in association with a power.

108 Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.

109 20. Warranted free of loss or damage caused by strikers locked-out workmen or persons taking part in labour disturbances riots or civil  
110 commotions.

111 Should Clause 10 be deleted, Clause 21 is to operate as part of this Policy.

112 21. Warranted free of any claim based upon loss of, or frustration of, the insured voyage or adventure caused by arrests restraints or  
113 detentions of Kings Princes Peoples Usurpers or persons attempting to usurp power.

114 22. Warranted free of loss or damage caused by earthquake.

120 (b) Where a claim for total loss of the Vessel is admitted under this Policy 120  
121 and expenses have been reasonably incurred in salvaging or attempting to save 121  
122 the Vessel and other property and there are no proceeds, or the expenses exceed 122  
123 the proceeds, then this Policy shall bear its *pro rata* share of such proportion of 123  
124 the expenses, or of the expenses in excess of the proceeds, as the case may be, 124  
125 as may reasonably be regarded as having been incurred in respect of the Vessel; 125  
126 but if the Vessel be insured for less than its sound value at the time of the 126  
127 occurrence giving rise to the expenditure, the amount recoverable under this 127  
128 clause shall be reduced in proportion to the under-insurance. 128

129 12. Average payable irrespective of percentage and without deduction, 129  
130 new for old, whether the average be particular or general. 130

131 13. No claim shall in any case be allowed in respect of scraping or painting 131  
132 the Vessel's bottom. 132

133 14. In no case shall Underwriters be liable for unrepaired damage in addition 133  
134 to a subsequent total loss sustained during the period covered by this Policy. 134

135 15. In ascertaining whether the Vessel is a constructive total loss the 135  
136 insured value shall be taken as the repaired value and nothing in respect of the 136  
137 damaged or break-up value of the Vessel or wreck shall be taken into account. 137

138 No claim for constructive total loss based upon the cost of recovery and/or 138  
139 repair of the Vessel shall be recoverable hereunder unless such cost would 139  
140 exceed the insured value. 140

141 16. In the event of accident whereby loss or damage may result in a claim 141  
142 under this Policy, notice shall be given to Underwriters prior to survey and also, 142  
143 if the Vessel is abroad, to the nearest Lloyd's Agent so that a surveyor may be 143  
144 appointed to represent Underwriters should they so desire. Underwriters shall 144  
145 be entitled to decide the port to which the Vessel shall proceed for docking 145  
146 or repair (the actual additional expense of the voyage arising from compliance 146  
147 with Underwriters' requirements being refunded to the Assured) and shall have 147  
148 a right of veto concerning a place of repair or a repairing firm. Underwriters 148  
149 may also take tenders or may require tenders to be taken for the repair of the 149  
150 Vessel. Where a tender so taken is accepted with the approval of Underwriters 150  
151 an allowance shall be made at the rate of 50% per annum on the insured value 151  
152 for time lost between the despatch of the invitations to tender and the accept- 152  
153 ance of a tender to the extent that such time is lost solely as the result of 153  
154 tenders having been taken and provided that the tender is accepted without 154  
155 delay after receipt of Underwriters' approval. 155

156 Due credit shall be given against the allowance as above for any amount 156  
157 recovered:— 157

158 (a) in respect of fuel and stores and wages and maintenance of the 158  
159 Master Officers and Crew or any member thereof allowed in 159  
160 general or particular average. 160

161 (b) from third parties in respect of damages for detention and/or loss 161  
162 of profit and/or running expenses. 162

163 Where a part of the cost of average repairs other than a fixed deductible 163  
164 franchise is not recoverable from Underwriters the allowance shall be reduced 164  
165 by a similar proportion. 165

166 In the event of failure to comply with the conditions of this clause, 15% 166  
167 shall be deducted from the amount of the ascertained claim. 167

168 17. Warranted that no insurance (other than insurance against the 168  
169 risks excluded by the Free of Capture etc. Clause and risks enumerated in the 169  
170 Institute War and Strike Clauses) in excess in the aggregate of 25% of the 170  
171 value stated herein, on Excess or Increased Value of Hull and Machinery, 171  
172 Disbursements, Managers' Commissions, Profits, Freight or other interests, 172  
173 howsoever described, on or in respect of the Vessel hereby insured, and whether 173  
174 or not on P.P.I., F.I.A. or other like conditions, is or shall be effected 174  
175 to operate during the currency of this Policy by or for account of the Assured, 175  
176 Owners, Managers or Mortgagees, except that in the event of the Vessel being 176  
177 chartered during the currency of this insurance. 177

178 (a) a sum not exceeding the gross freight or hire for the first and 178  
179 next succeeding cargo passage, or 179

180 (b) a sum not exceeding 50% of the gross hire which is to be earned 180  
181 under the charter in a period not exceeding 18 months. 181


182 may be insured as from the date of the signing of the charter until the date 182  
183 of expiry of this Policy. But if additional insurance has already been effected 183  
184 in accordance with the provisions of this warranty then the sum to be 184  
185 insured under (a) or (b) shall be reduced by such additional insurance in- 185  
186 sofar as it exceeds 10% of the value stated herein. Provided always that a 186  
187 breach of this warranty shall not afford Underwriters any defence to a claim 187  
188 by a Mortgagee who has accepted this Policy without knowledge of such 188  
189 breach. 189

190 18. It is agreed that no assignment of or interest in this Policy or in any 191  
192 moneys which may be or become payable thereunder is to be binding on or 192  
193 recognised by the Underwriters unless a dated notice of such assignment or 193  
194 interest signed by the Assured, and by the assignor in the case of subsequent 194  
195 assignment, is endorsed on this Policy and the Policy with each endorsement 195  
196 is produced before payment of any claim or return of premium thereunder; 196  
197 but nothing in this clause is to have effect as an agreement by the Underwriters 197  
198 to a sale or transfer to new management. 198



EXHIBIT "B" TO STIPULATION OF FACTS—7a

(Page 6)

(See opposite) 

In all communications please quote  
the following reference

**576**

69599

B. & REVERE STAMP  
OFFICE TO COVER NCT.  
PRO FORMA HELD BY JONAS  
HIGGINS

LOSSES IF ANY, HEREIN TO BE PAID TO

*Toad Shipyard Corporation*  
(Galveston, Texas)

OR ORDER

WILLIS FABER, DUNSMUIR

*Willis Faber*  
London

**LLOYD'S**



**LONDON**

5th November 1938

"ATZCAPOTRAIDG S.S."

Period 8.30 P.M. 11.8.38 O.S.T. to  
10.10 P.M. 15.8.38 O.S.T.

On WILL. MACHINERY LTD.,  
22, 20th St. N.Y.C.

(In the event of accident whereby loss or damage may  
result in a claim under this Policy, the settlement  
will be much facilitated if immediate notice be given  
to the nearest Lloyd's Agent.)

**IMPORTANT.**

Before presenting this policy for payment of any Claim or  
Return of Premium it is essential that it shall bear the  
signature of the party in whose name it is drawn, or of any  
party to whom interest is transferred by endorsement.

154

[fol. 155]

EXHIBIT "C" TO STIPULATION OF FACTS

SALVAGE ASSOCIATION, LONDON  
39 CORTLANDT STREET  
NEW YORK 7, N. Y.

Cable Address "WRECKAGE" New York

FLORIDA OFFICE

1825 PRUDENTIAL BUILDING  
JACKSONVILLE 7, FLA.

"IN ACCEPTING THIS REPORT OR CERTIFICATE IT IS AGREED THAT THE EXTENT OF THE OBLIGATION OF THIS ASSOCIATION WITH RESPECT THERETO IS LIMITED TO FURNISHING A SURVEYOR BELIEVED TO BE COMPETENT, AND IN THE MAKING OF THIS REPORT OR CERTIFICATE THE SURVEYOR IS ACTING ON BEHALF OF THE PERSON REQUESTING THE SAME, AND NO LIABILITY SHALL ATTACH TO THIS ASSOCIATION FOR THE ACCURACY THEREOF."

July 17th 1959

Survey Report No. 5192

This Is To Certify that the undersigned Surveyor at this port did at the request of Messrs Johnson & Higgins, 63 Wall Street, New York 5, New York, and on behalf of the Underwriters concerned in the Todds Shipyards Corporation Builders Risk Policy, survey without prejudice, the

HULL #179 (NAVY PILEDRIVER YPD-43)

for the purpose of ascertaining the nature and extent of the damage alleged to have been sustained during June 1959, in consequence of the subject vessel encountering heavy weather, while on passage in tow of the tug "M MORAN" from Houston Texas to Charleston, S. C.

Log books and extracts not available.

On the 9th June 1959, the Undersigned proceeded to the plant of Messrs Charleston Dry Dock Company, Charleston, S. C., where the vessel was lying afloat, and upon examination the following damage was found, and recommendations made:—

**FOUND**

128 linear feet 6" x 6" fir timber fenders including four radius sections gouged, cut and/or missing. Seven studs missing, thirteen bent.

Lower ring clamp to the retaining bracket for the hoisting cylinder fractured.

One angle valve at the lower control manifold of the hydraulic cylinder broken, 24" long section of hydraulic line pipe broken. Fluid to system leaked out.

Four (4) aft void tanks, 2 port and 2 starboard feed water tanks and one (1) port and one (1) starboard void tank contaminated with salt water.

[fol. 156]

**FOUND (cont'd)**

Forward section of decks scarred in numerous places.

One fuel tank check vent on the starboard side bent.

Two (2) sections of wood liners at base of piledriver gouged and split.

**RECOMMENDED**

128 linear feet fender system and 20 studs with bolts and nuts to be replaced.

To be removed, repaired and reinstalled as original.

Valve and 24" section hydraulic line to be renewed, refilled with fluid and tested under operating conditions.

To be opened up, cleaned and closed up in good order. (10 tanks).

**RECOMMENDED**

To be recoated.

To be renewed.

Approximately 12 linear feet wood liners to piledriver leads to be renewed.

GENERAL NOTES:

- A. All new and disturbed work to be tested and proven satisfactory.
- B. All new and disturbed work to be recoated.
- C. All removals necessary to effect repairs to be replaced in good order.

The cost of the foregoing repairs was agreed with Messrs Charleston Dry Dock Company, Charleston, S. C., in the sum of Six Thousand, and Seventy Seven Dollars, (\$6,077.00).

/s/H A WEBBER  
*Underwriter's Surveyor*  
 Original Signed

JAMES D. LUCAS, JR.  
*Acting Surveyor*

[fol. 158]

## PLAINTIFF'S EXHIBIT No. 2

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

53RD JUDICIAL DISTRICT

No. 112,081

---

TODD SHIPYARDS CORPORATION

—v.—

BOARD OF INSURANCE COMMISSIONERS, ET AL.

---

Supplemental Stipulations

It is stipulated and agreed by and between the parties hereto that each of the following recitations is true and correct and that this stipulation may be introduced in evidence on the trial of this case and as conclusive proof of each such recitation.

The proceeds from the tax imposed by Article 21.38, Section 2(e) of the Insurance Code of the State of Texas on premiums paid by the insureds to unadmitted insurers is paid to the State Board of Insurance. The State Board of Insurance and the Comptroller of the State of Texas, by departmental construction, have construed the levy imposed by Article 21.38, Section 2(e) as a tax upon gross premiums, and have transferred the proceeds from 21.38, Section 2(e) to the State Comptroller's Omnibus Fund. (Fund No. 120) Up until August 31, 1959, the total amount so transferred exceeded \$53,000.00. Most of the proceeds in the State Comptroller's Omnibus Fund are derived from occupation taxes. Article 7, Section 3 of the Constitution of the State of Texas requires that one-fourth of all occupation taxes be set aside for the Public Free School Fund. One-fourth of the Omnibus Fund is set aside for the Public Free School Fund, and, accordingly, one-fourth of the taxes collected under Article 21.38, Section 2(e) have been set aside for the Public Free School Fund.



Article 21.38, Section 2(d) of the Texas Insurance Code imposes a tax of 5% on premiums paid by insureds to unauthorized insurers for insurance in excess of that which can be procured from authorized insurers. Licensed agents procuring such excess insurance are made liable for the tax imposed by 21.38, Section 2(d); and this tax has been [fol. 159] construed by departmental construction by the State Board of Insurance and the State Comptroller as a tax on gross premiums. At least since September 1, 1955, and for an undetermined period prior to September 1, 1955, all proceeds from the tax imposed by Article 21.38, Section 2(d) have been transferred by the State Board of Insurance and the State Comptroller to the State Comptroller's Omnibus Fund. (Fund 120) Article 7, Section 3 of the Constitution of the State of Texas requires that one-fourth of all occupation taxes be set aside for the Public Free School Fund. One-fourth of the Omnibus Fund is set aside for the Public Free School Fund, and, accordingly, one-fourth of the taxes collected under Article 21.38, Section 2(d) have been set aside for the Public Free School Fund.

For the Comptroller's accounting year ending August 31, 1957, the total proceeds collected due to the tax imposed by Article 21.38, Section 2(d) amounted to \$596,123.95. For the Comptroller's accounting year beginning August 31, 1957, and ending August 31, 1958, the total proceeds collected due to such tax amounted to \$343,387.91. For the Comptroller's accounting year beginning August 31, 1958 and ending August 31, 1959, the total proceeds collected due to such tax amounted to \$439,925.34.

Article 21.38, Section 2(a) of the Texas Insurance Code imposes an annual license fee of \$25.00 upon commissioned agents who desire to place excess insurance with unadmitted insurers in accordance with Article 21.38, Section 2(c) and (d). The fee imposed by Article 21.38, Section 2(a) is a charge for the privilege of obtaining such a license, and the proceeds of this fee have been and are transferred to Fund 124, the agents' license fund, and not to the Comptroller's Omnibus Fund (Fund 120). The monies in Fund 124 are appropriated for the use of the State Board of Insurance.

On any products liability incurred by Todd Shipyards and covered by Lloyds of London and Institute of London Underwriters policies 542/59/137084 (Ex. B-5a and 5b) and 542/59/137085 (Ex. 6a and 6b), the first \$25,000.00 of such liability is to be paid by Traveler's Insurance Company, primary carrier. Traveler's Insurance Company is an admitted insurer and authorized to do business in the State of Texas.

[fol. 160] However, each party reserves the right to introduce other evidence at the time of the trial so long as such evidence is not offered to contradict any of the agreed recitations.

Will Wilson, Attorney General of Texas, Fred B. Werkenthin, Assistant Attorney General, Bob E. Shannon, Assistant Attorney General, Attorneys for Defendants, Capitol Station, Austin 11, Texas.

Liddell, Austin, Dawson & Huggins, by Charles R. Vickery, Jr., by Meyer W. Witt.

[fol. 161]

PLAINTIFF'S EXHIBIT No. 3

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

53RD JUDICIAL DISTRICT

No. 112,081

TODD SHIPYARDS CORPORATION

—v.—

BOARD OF INSURANCE COMMISSIONERS, ET AL.

Supplemental Stipulation No. 2

It is stipulated and agreed by and between the parties hereto that each of the following recitations is true and correct and that this stipulation may be introduced in evidence on the trial of this case and as conclusive proof of each such recitation.

The total gross tax fund from Art. 7064 from August 1956 to August 1957 cleared to the Comptroller's Omnibus Fund by the State Board of Insurance from licensed domestic and foreign stock or mutual, fire and/or casualty insurance companies was \$14,689,431.19.

The total gross tax fund from Art. 7064 from August 1957 to August 1958 cleared to the Comptroller's Omnibus Fund by the State Board of Insurance from licensed domestic and foreign stock or mutual, fire and/or casualty insurance companies was \$16,360,508.42.

The total gross tax fund from Art. 7064 from August 1958 to August 1959 cleared to the Comptroller's Omnibus Fund by the State Board of Insurance from licensed domestic and foreign stock or mutual, fire and/or casualty insurance companies was \$16,540,225.28.

The insurance brokers, Johnson-Higgins, Griswold & Company, and Marsh & McLennan, which handled the insurance transactions involved in this lawsuit are licensed New York insurance brokers, and are licensed to place the said insurance of the insurers.

However, each party reserves the right to introduce other evidence at the time of the trial so long as such evidence is not offered to contradict any of the agreed recitations.

Will Wilson, Attorney General of Texas, Fred B. Werkenthin, Assistant Attorney General, Bob E. Shannon, Assistant Attorney General.

Liddell, Austin, Dawson & Huggins, By Charles R. Vickery, Jr., By Meyer W. Witt.

Taxed

[fol. 162]


## ATTACHMENTS TO SUPPLEMENTAL STIPULATION

TODD SHIPYARDS CORPORATION  
(PRODUCTS DIVISION)

JANUARY 20, 1960

TYPE OF INSURANCE				DATE PAID	PREMIUM INVOLVED	TAX
Builders Risk —	Hull No.	179		12/23/59	\$ 979.58	\$ 48.98
"	"	"	183	"	1,468.92	73.45
"	"	"	244	"	8,753.38	437.67
"	"	"	183	"	13,530.00	676.50
"	"	"	206-7-8	12/10/59	341.07	17.05
"	"	"	218-37	"	462.93	23.14
"	"	"	"	"	945.16	47.26
"	"	"	244	"	943.44	47.17
"	"	"	238-9	"	1,723.21	86.16
					<u>\$29,147.69</u>	<u>\$1,457.38</u>

(Attachment to Supplemental Stipulation.)

(See opposite) 

<u>Policy</u>	<u>Period</u>	<u>Risk</u>	<u>Premium</u>	<u>Tax Paid</u>	<u>Date Tax Paid</u>	<u>Date Premium Paid</u>
Pro Forma of Lloyd's #576/88590 London and Institute of London Underwriters	Construction Period	Builders Risk Ins. Cover- ing Hall No. 214 during construction	86.02 13.35	4.30 .67	3/31/59 8/31/59	3/31/59 7/16/59
Pro Forma of Lloyd's #576/91259 London and Institute of London Underwriters	Construction Period	Builders Risk Ins. Cover- ing Halls Nos. 216 and 217 during construction	385.56 2,535.91	19.28 126.80	8/31/59 "	7/16/59 "
Lloyd's London #576/91101 Institute of London Underwriters	Repair Period	Builders Risk Ins. cover- ing Hall No. 216 during re- pairs carried out after construction & delivery had been completed	-	-	-	-
Lloyd's London #576/91260 Institute of London Underwriters	Construction Period	Builders Risk Ins. Cover- ing Halls Nos. 238 & 239 during construction	62.29	3.11	8/31/59	7/13/59
Lloyd's London #576/91261 Institute of London Underwriters	Construction Period	Builders Risk Ins. Cover- ing Hall No. 240 during construction	860.13	43.01	8/31/59	7/13/59
				8,122.84		

See attached itemized list -----

1,457.38

9,580.22

Plus Galveston Division total -----


11,025.31

TOTAL Tax paid -----

\$ 20,605.53




(Attachment to Supplemental Stipulation.)

(See opposite) 

<u>Policy</u>	<u>Period</u>	<u>Risk</u>	<u>Premium</u>	<u>Tax Paid</u>	<u>Date Tax Paid</u>	<u>Date Premium Paid</u>
Lloyd's London Institute of London Underwriters #576/86391	Construction Period	Builders Risk Ins. Covering Hull No. 180 during construction	870.53	57.24	9/16/58	9/3/57
Lloyd's London Institute of London Underwriters #576/86390	Construction Period	Builders Risk Ins. Covering Hulls Nos. 181 & 182 during construction	108.63	6.97	9/16/58	2/11/58
Pro Forma of Lloyd's London and Institute of London Underwriters #576/88655	Construction Period	Builders Risk Ins. Covering Hull No. 183 during construction	12,491.08	624.55	1/19/59	1/19/59
Pro Forma of Lloyd's London and Institute of London Underwriters #576/88884	Construction Period	Builders Risk Ins. Covering Hull No. 184 during construction	713.36	35.67	10/14/58	10/14/58
Lloyd's London Institute of & #576/86389 London Underwriters #576/86902	Construction Period	Builders Risk Ins. Covering Hulls Nos. 185 to 199 during construction	205.27 102.53	10.26 6.57	3/31/59 9/16/58	3/31/59 2/11/58
Pro Forma of Lloyd's London and Institute of London Underwriters #576/88885	Construction Period	Builders Risk Ins. Covering Hulls Nos. 202 and 203 during construction	3,660.49	183.02	8/31/59	8/24/59
Lloyd's London Institute of London Underwriters #576/89740	Construction Period	Builders Risk Ins. Covering Hull No. 204 during construction	304.03	15.20	4/8/59	4/8/59
Pro Forma of Lloyd's London and Institute of London Underwriters #576/91301	Construction Period	Builders Risk Ins. Covering Hulls Nos. 206, 207 & 208 during construction	1,595.20	79.76	8/31/59	7/16/59
Lloyd's London Institute of London Underwriters #576/91258	Construction Period	Builders Risk Ins. Covering Hull No. 209 during construction	613.84	30.69	8/31/59	7/13/59
Lloyd's London Institute of London Underwriters #576/88589	Construction Period	Builders Risk Ins. Covering Hull No. 213 during construction	97.41	4.87	10/14/58	10/14/58

(Attachment to Supplemental Stipulation.)

(See opposite) 

**SHIPYARDS CORPORATION  
(PRODUCTS DIVISION)**

<u>POLICY</u>	<u>Period</u>	<u>Risk</u>	<u>Premium</u>	<u>Tax Paid</u>	<u>Date Tax Paid</u>	<u>Date Premium Paid</u>
Lloyd's London Institute of London Underwriters	#542/M.D.9350	6/6/56 to 6/6/57	Hull & Machinery Ins. Todd-owned Dry Docks	\$ -	\$ -	-
		6/6/57 to 5/6/58	28,430.25	1,887.88	9/16/58	7/3/57
		6/6/58 to 6/6/59	28,430.25	1,781.27	"	7/3/58
		6/6/59 to 6/6/60	26,251.46	1,312.57	8/31/59	7/9/59
		" "	2,180.92	109.05	"	"
Lloyd's London Institute of London Underwriters		5/16/57 to 5/16/58	Collision, Flood, Sub- sidence & Collapse Ins.- Piers, Bulkheads & Launch- ing Ways	4,000.00	264.96	9/16/58
		" "	3,375.36	221.95	9/16/58	9/4/57
		5/16/58 to 5/16/59	8,000.00	500.74	"	7/9/58
	#509/59/BH468/JY	5/16/59 to 5/16/60	7,500.00	375.00	8/31/59	8/27/59
				<u>1,097.69</u>		
Pro Forma of Lloyd's London and Institute of London Under- writers		9/30/56 to 9/30/57	Industrial Work Property Damage Insurance	199.18	12.92	9/16/58
		9/30/57 to 9/30/58		500.00	25.00	2/12/59
		" "	2,515.78	160.37	9/16/58	3/19/58
	#576/89514	9/30/58 to 9/30/59		-	-	-
Lloyd's London Institute of London Underwriters		1/3/57 to 5/1/57	Products Liability Ins. First Excess Cover	104.60	6.71	9/16/58
	#542/59/137084	5/1/59 to 5/1/60		-	-	-
Lloyd's London Institute of London Underwriters	#542/59/137085	5/1/59 to 5/1/60	Products Liability Ins. Second Excess Cover	-	-	-
Pro Forma of Lloyd's London and Institute of London Under- writers	#576/90158	Construction Period	Builders Risk Ins. cover- ing Hull No. 179 during construction	4,248.98	212.45	8/31/59
						7/13/59

PLAINTIFF'S EXHIBIT No. 4

Eighty-Fourth Annual Report  
of the  
STATE BOARD OF INSURANCE

For the Year Ending August 31, 1959

(Emblem)

PENN J. JACKSON  
Chairman of the Board

DAVID B. IRONS  
Member

ROBERT W. STRAIN  
Member

WILLIAM A. HARRISON  
Commissioner of Insurance

167]

TOTAL CLEARED TO OMNIBUS FUND

August 31, 1959

	AMOUNT
Penalties on Delinquent Taxes	\$ 494.46
Domestic Life	1,651,984.99
Foreign Life	8,218,072.02
Domestic Stock Fire	37,300.92
Foreign and Alien Stock Fire	299,993.36
Excess Agents	439,925.34
Domestic Mutual Fire and/or Casualty	92,503.84
Foreign Mutual Fire and/or Casualty	2,054,034.54
Domestic Stock Fire and/or Casualty	1,063,644.05
Foreign and Alien Stock Fire and/or Casualty	12,694,016.05
Domestic Stock Casualty	258,304.34
Foreign Stock Casualty	340,421.54
Mexican Casualty	9,520.65
Lloyds	81,483.24
Reciprocal Domestic	35,249.49
Reciprocal Foreign	623,607.95
Title	193,887.62
Mutual, Life, Health and Accident	174,520.14
County Mutual Fire	17,309.60
Insurance purchased from unauthorized insurers	31,065.77
Retaliatory Fees	195,376.52
	<u>\$28,512,716.43</u>



[fol. 168]

## PLAINTIFF'S EXHIBIT No. 6

## TOTAL CLEARED TO OMNIBUS FUND

FOR 1957-58

CODE	AMOUNT
Penalties on Delinquent Taxes	3844
A Domestic Life	1,648,472
B Foreign Life	7,431,092
C Domestic Stock Fire	43,494
D Foreign and Alien Stock Fire	449,072
Excess Agents	343,357
E Domestic Mutual Fire and/or Casualty	54,504
F Foreign Mutual Fire and/or Casualty	2,063,577
G Domestic Stock Fire and/or Casualty	973,018
H Foreign and Alien Stock Fire and/or Casualty	12,383,280
I Domestic Stock Casualty	253,622
J Foreign Stock Casualty	139,932
K Mexican Casualty	979
L Lloyds	84,704
M Reciprocal Domestic	35,157
N Reciprocal Foreign	299,557
Q Title	149,890
V Mutual, Life Health and Accident	162,984
W County Mutual Fire	17,468
Insurance purchase from unauthorized Insurers	22,443

---



---

 \$26,555,822

[169]

## PLAINTIFF'S EXHIBIT No. 7

Part I

of the

ANNUAL REPORT OF THE

COMPTROLLER OF PUBLIC ACCOUNTS

of the

STATE OF TEXAS

1959

Receipts and Disbursements  
of  
State Funds

---

ROBERT S. CALVERT  
Comptroller

---

TO THE GOVERNOR

(Emblem)

TABLE No. 103

## OMNIBUS TAX CLEARANCE FUND NO. 120

Year Ended August 31, 1959

		BALANCE ON HAND		
		9-1-58	RECEIPTS	TOTAL
050	Crude Oil	\$ 9 994 563 91	\$134 577 945 00	\$144 572 508 91
051	Natural Gas	647 896 99	46 835 881 40	47 483 778 39
052	Sulphur	3 118 55	3 522 487 23	3 525 605 78
054	Cement	231 491 59	2 612 798 78	2 844 290 37
057	Utilities	48 338 97	7 152 917 81	7 201 256 78
058	Telephone	737 48	7 247 329 10	7 248 066 58
059	Well Servicing	95 511 29	1 115 650 36	1 211 161 65
060	Motor Carriers	4 509 97	102 333 82	106 843 79
061	Stock Share			
	Transfer	19 749 75	242 041 12	261 790 87
077	Coin Operating			
	Machines	2 538 75	225 867 50	228 406 25
083	Radios	12 674 94	1 657 391 82	1 670 066 76
084	Cosmetics	74 007 41	811 943 74	885 951 15
085	Cards	2 250 02	32 454 54	34 704 56
133	Insurance			
	Occupation	199 144 15	28 512 716 43	28 711 860 58
138	Liquor	712 860 75	12 518 439 31	13 231 300 06
139	Wine	42 331 18	964 883 32	1 007 214 50
142	Ale	9 866 46	141 966 46	151 832 92
143	Prescription	22 00	288 20	310 20
148	Auto Sales	1 207 496 78	20 371 704 10	21 579 200 88
153	Beer	1 803 194 88	17 048 102 70	18 851 297 58
248	Cigarette			
	Permits	29 768 00	454 699 71	484 467 71
135	Cigarette Tax	3 149 563 21	51 324 583 36	54 474 146 57

TABLE No. 103 Continued

94.171]					
25	Liquor				
	Permits	\$	0 —	\$	682 687 42
				\$	682 687 42
26	Wine & Beer				
	Permits		63 682 63		627 754 17
					691 436 80
27	Store Tax				
	Exemption		1 976 41		192 335 03
					194 311 44
28	Store Tax		8 202 02		2 121 290 70
					2 129 492 72
29	Exemption Fees		478 00		39 304 00
					39 782 00
30	Store Tax				
	Service Fees		715 00		13 735 00
					14 450 00
36	Store Tax Fees		1 522 30		129 977 50
					131 499 80
		\$	18 368 213 39	\$341 281 479 63	\$359 649 693 02

Allocated as Follows:

## Enforcement:

## Crude Oil Enforcement Fees:

General Revenue

Restricted \$ 419 631 20

Comptroller's Operating

Fund 255 027 18 \$ 674 658 38

## Natural Gas Enforcement Fees:

General Revenue

Restricted 217 402 62

Comptroller's Operating

Fund 16 760 52 234 163 14

## Cosmetics-Cards Enforcement Fees:

General Revenue

Restricted 7 577 31

Comptroller's Operating

Fund 10 835 79 18 413 10

## Store Exempt Filing Fees:

General Revenue

Restricted 11 594 00

Comptroller's Operating

Fund 27 522 00 39 116 00

TABLE No. 103 Continued

## Store Tax Filing Fees:

General Revenue		
Restricted	\$	25 176 80
Comptroller's Operating Fund		
		104 795 50
	\$	129 972

Vending Machine		
Enforcement Fund		25 000 00
Cigarette Tax		
Enforcement Fund		1 020 301 12
Radio-Television		
Enforcement Fund		33 401 12
Available School Fund		83 613 804 50

## General Allocations:

Farm to Market		
Road Fund		15 000 000 00
State Blind		
Assistance Fund		1 299 999 98
State Children		
Assistance Fund		3 900 000 00
Teacher Retirement		
System		33 141 604 98
State Old Age		
Assistance Fund		39 660 973 00
State Disabled		
Assistance Fund		1 500 000 00
Foundation School		
Fund		98 989 673 12

[fol. 172]

General Revenue Fund		
—for Repayment of		
Advances to Founda-		
tion School Fund		29 276 146 00
General Revenue Fund		
Cigarette Tax	43 517 819 74	
Store & Store		
Exemption Tax	1 753 690 62	45 271 510 36

TABLE NO. 103 Continued

## Legislative Expense Fund—

Cigarette Tax

\$ 1 900 000 00

Total Allocated

\$355 728 739 26

## NET CASH BALANCE,

August 31, 1959:

Reserved for Transfer

Sept. 1, 1959, to:

Comptroller's Operating Fund:

Crude Oil Enforcement

Fees

48 204 15

Natural Gas Enforcement

Fees

3 225 73

Store License &amp;

Exemption Fees

2 193 50

Cigarette Tax Enforcement

Fees

81 292 49

General Allocations to:

State Old Age

Assistance Fund

3 318 253 59

State Disabled

Assistance Fund

30 220 93

State Blind

Assistance Fund

112 533 37

State Children

Assistance Fund

325 000 00

3 920 953 76

---

\$359 649 693 02

---



[fol. 173]

DEPOSITION OF EDWARD W. COSTELLO

10,802

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

53RD JUDICIAL DISTRICT

No. 112,081

---

TODD SHIPYARDS CORPORATION, Plaintiff,

—against—

BOARD OF INSURANCE COMMISSIONERS, et al., Defendants.

---

One Broadway,  
New York, New York.

November 12, 1959  
10:30 o'clock a.m.

DEPOSITION OF EDWARD W. COSTELLO

[Stamp—Filed in Court of Civil Appeals, 3rd Supreme  
Judicial District, Austin, Texas, Apr 5, 1960, Mrs. R. E.  
Moore, Clerk, By ....., Deputy.]

[Stamp—Filed in the 53 District Court of Travis County,  
Texas at 8:30 A.M., Nov 23, 1959, O. T. Martin, Jr., District  
Clerk, By Vera B. Steedley, Deputy.]

Taxed

[fol. 174]

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

53RD JUDICIAL DISTRICT

No. 112,081

---

TODD SHIPYARDS CORPORATION, Plaintiff,

—against—

BOARD OF INSURANCE COMMISSIONERS, et al., Defendants.

---

Deposition of Edward W. Costello, taken by Defendant Board of Insurance Commissioners, pursuant to stipulation between the parties, at No. 1 Broadway, New York, New York, on November 12, 1959, at 10:30 a.m., before a Notary Public in and for the State of New York.

---

[fol. 175] Appearances:

Liddell, Austin, Dawson & Huggins, Attorneys for the Plaintiff, 510 Gulf Building, Houston 2, Texas, By: Harry G. Hill, of Counsel.

Will Wilson, Attorney for the Defendant, Attorney General of the State of Texas, Capitol Station, Austin, Texas, By: Bob Shannon, of Counsel, Assistant Attorney General.

---

The parties to the above cause, through their attorneys of record, agree that the deposition of Edward W. Costello, a witness for the plaintiff, may be taken on oral examination of such witness before a certified shorthand reporter and notary public of the State of New York on November 12, 1959.

The said parties agree to waive all requirements of notice, service of notice, commission, and issuance of commission, and waive all other requirements of the statutes

and rules regarding the taking of oral depositions, and agree that said deposition shall be taken as follows:

### I.

It is agreed by the parties that objections to the testimony [fol. 176] made during the taking of the deposition are not waived, and may be urged for the first time at the trial when this deposition or any part of it is read into evidence.

### II.

It is agreed that after such testimony has been transcribed by the court reporter, he shall then certify on said deposition that the witness was duly sworn by him, and further that the deposition is a true record of the testimony given by the witness, and that he will file this deposition with the clerk of the court in which this cause is pending.

### III.

It is agreed between the parties that all the requirements with respect to the submission of the transcribed deposition to the witness for examination and reading and signing are waived.

---

[fol. 177] EDWARD W. COSTELLO, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Shannon:

Q. State your name, please.

A. Edward W. Costello.

Q. Your residence is New York City, New York?

A. I am a resident of Englewood, New Jersey.

Q. You are employed by whom?

A. Todd Shipyards Corporation.

Q. That is a New York corporation?

A. That is correct.

Q. When was it incorporated?

A. 1916.

Q. Where are the main offices of Todd Shipyards Corporation located?

A. One Broadway, New York City.

Q. Mr. Costello, what other states, if any, does Todd Shipyards Corporation have offices in?

A. May this be off the record?

Mr. Hill: Off the record.

(Discussion off the record.)

A. The states are New Jersey, Louisiana, Texas, California, and Washington.

Q. Do you have plants located in any other part of the world?

A. No.

Q. At each one of these plants, do you maintain an office?

A. Yes.

Q. Where are your offices in Texas, and plants?

A. Our plants and offices in Texas: One is located on Pelican Island in Galveston, Texas; and the other is located on Industrial Road in Houston, Texas.

Q. When did you first enter into Todd's Texas business?

A. 1934.

Q. At that time, you secured a certificate of authority to do business in Texas?

A. That I don't know.

Mr. Hill: Yes.

A. The answer is yes.

Q. Approximately, Mr. Costello, how many employees do you have employed in these two plants in Texas?

A. Well, the number, of course, is dependent upon the volume of work, and it fluctuates rather drastically. But [fol. 179] I would say that we possibly have at the present time, oh, 1,500 employees.

Mr. Hill: Suppose I check that and see what the count is today.

Mr. Shannon: All right.

Q. What position do you hold with the Todd Shipyards Corporation?

A. Assistant-Treasurer, insurance and claims manager.

Q. What do those duties encompass?

A. Arrangements of insurance, the settlement of claims.

Q. Mr. Costello, tell me a little bit about Todd Shipyards Corporation. What is the nature generally of the business of Todd? What do you do?

A. Ship repair and conversion work. Construction of vessels, manufacture of industrial equipment, oil burners, et cetera.

Q. What do you do at the plant located in Texas—generally the same, or are they specialized?

A. No; there it would be the same.

Q. The same type of work?

A. Yes.

Q. You are aware, Mr. Costello, that your company [fol. 180] has filed a franchise tax return in the State of Texas?

A. I am, yes.

Q. You are also aware that on your franchise tax return you stated that you did approximately 27 per cent plus of your total volume of business in Texas?

A. That I don't know of my own knowledge.

Q. You carry insurance on your various properties in the State of Texas?

A. Yes.

Q. What type of insurance do you carry on the various risks, if we can just list them by types; and then if you will describe generally what each kind of insurance is.

A. Fire, extended coverage, vandalism, malicious mischief.

Q. That is one type.

A. Yes.

Second type is hull and machinery on our dry docks.

Q. What is that first word?

A. Hull and machinery insurance on our dry docks. You want all types of insurance, whether they are involved in that tax situation or not; is that right?

Q. I want all types that would apply to your Texas [fol. 181] plants.

A. Hull and machinery insurance on floating equipment.

Collision, flood, subsidence, and collapse insurance on piers and bulkheads.

I am trying to think of others.

Steam boiler insurance.

Workmen's compensation insurance. Public liability insurance. Products liability insurance. Interior robbery and safe burglary and messenger robbery insurance. Legal liability insurance. Industrial work property damage insurance.

My memory is running out a bit. Builders risk insurance.

Q. Mr. Costello, out of that list of types of insurance, what are the kinds of insurance that are involved in this tax suit of some twelve that you have listed; how many?

A. The types of insurance on which we have paid the tax under protest are the industrial work property damage insurance, the builders risk insurance, the dry dock insurance, the pier and bulkhead collision insurance, and the product liability insurance, to the extent of the excess portion of that insurance.

[fol. 182] Q. What do you mean, to the excess portion?

A. Because it is only the excess portion that is in non-admitted cost.

Q. Would you describe very briefly for us what each type of the insurance policies are designed for and what kind of properties or risks do they protect. Starting with number one.

A. Fire, extended coverage, vandalism and malicious mischief.

Q. I mean on controverted types of insurance the ones that you have paid under protest to the State of Texas.

A. The dry dock insurance covers any damage from marine perils, the elements, collision, sinking, stranding, or negligence, negligence on the part of your employees, or the fault of any other parties.

Q. Now just go down the list of the other types and give a general definition.

A. Next is pier and bulkhead collision insurance. I shortened that. Covers any damage to the piers and bulkheads at our plants caused by collision, caused by flood, meaning a rise of navigable waters, subsidence or collapse.

Q. All right. The next one.

[fol. 183] A. The industrial work property damage insurance covers also damage to any property belonging to others which is undergoing repairs by us, or any property which is being put into a job which we are fabricating on order from others, exclusive of ship repair work and ship construction work.

Q. A type of liability insurance, is that right?

A. That is correct, yes.

Q. Would you continue the other types, please?

A. Builders risk insurance is a form of insurance that we arrange on all vessels that we have under construction, and in some instances on vessels on which we have major conversion jobs.

It covers practically any damage that is caused to the vessel while undergoing construction or repair. Or conversion.

Q. I believe there is product liability—that was the last type?

A. Product liability insurance is a form of insurance that covers us against claims for property damage or claims for personal injuries that arise out of events occurring after we have delivered the product, whether it be a repaired ship, reconverted ship, a newly-constructed ship, [fol. 184] or any type of industrial work that we do. After we have delivered the product to the owner—

Q. Mr. Costello—

A. That insurance does not apply while our work is being performed.

Q. These various types of insurance are insured with what companies?

A. Lloyds, London, and the companies comprising the Institute of London Underwriters.

Q. That is an English corporation?

A. That is correct.

Q. How are these contracts of insurance made?

A. When I say it is correct, when I say it is an English corporation, I actually do not know. But it is a group of English companies.

Q. As I understand it, the actual transactions between



Todd and Lloyds of London are negotiated through three brokerage houses?

A. That is correct.

Q. What are those brokerage houses?

A. Johnson and Higgins, Marsh & McLennan, Inc., and Griswold and Company.

[fol. 185] Q. They located here in New York City?

A. All in New York.

Q. Could you tell us, very briefly, what is their function?

A. Their function as insurance brokers is to represent us in arranging insurance on the broadest form of coverage possible at the lowest rate possible.

Q. Mr. Costello, Lloyds of London, then, has the insurance on the Todd risks at the plant in Galveston and Houston. Has that insurance company had those risks since the time that Todd entered into business in the State of Texas?

A. Yes. With respect to those forms of coverage that we were carrying at a date as early as that.

Q. Mr. Costello, I am just asking generally here, and it may require a more or less lengthy discussion by you of some insurance procedures. But I just want to know how it came about that Todd Shipyards Corporation took insurance with Lloyds of London.

A. Because it was recommended by our brokers.

Q. In other words, you had had insurance with another company before this recommendation by your brokers; is that correct?

[fol. 186] A. That is correct, and in some cases, as a matter of fact, London only carried part of the insurance.

Q. What is the arrangement—you may not know this, but I am just asking generally—what is the arrangement between an insurance company and the brokerage house that a broker would recommend one company over another company to one of their clients?

A. I would assume that the only reason they would recommend one company over another might be one of three reasons. Better coverage, lower rates, or more reputable underwriter.

Q. In other words, any solicitation that might have been made by Lloyds of London was made through one of their

brokerage houses to you; it wasn't a direct sort of a thing?

A. Well, we never do any direct business with the underwriters.

Q. It is always done through the others?

A. Always done through the brokers.

Q. Let me ask another general question, Mr. Costello:

Of course, the insuring company is interested in knowing about the risks that they are about to insure and how do [fol. 187] you furnish or how do they learn about data about the desirability of insuring these risks? Do they send someone down to Texas or do you submit something to them, or what?

A. We give to the broker the particulars of the risks and he in turn arranges the insurance with the underwriters. As to prior inspection, I can only recall—taking the last 25 years, one occasion when the underwriters inspected the risk.

Q. In other words, it is just not a practice of the business to inspect the risks before issuing insurance on this type of property?

A. That is right. I don't say that happens with all insurance, but it does definitely happen in our case. And this instance I speak of was not in connection with the writing of insurance. We already had the insurance and had been arranging it with them for years. But they just decided they would like to make a general inspection of the dry docks.

Q. Assume that you have a risk that you wish to insure in Texas. Does the Texas office notify Johnson & Higgins, or do they notify you that they want to take out such insurance on this, or how is that carried through?

[fol. 188] A. The Texas offices do not determine whether or not something should be insured. They do acquaint us with perhaps some particular risk that might be coming up differing from these types of insurance that I mentioned.

For example, they may have a unique type of job where they are not sure whether or not it should be brought to our attention, and in the interest of making certain that we can view the insurance phase of it, they bring it to our attention.

Q. In other words, they just correspond with you about the desirability or the possibility of some need for it?

A. It is possibly that we may wish to consider insuring something.

Q. In other words, your New York office, then, has the first and the ultimate decision on whether or not to insure?

A. That is correct.

Q. When you do insure a particular risk, how are the Texas offices notified that this risk is being protected with insurance?

A. Speaking of these types of insurance that I have listed, both Texas offices know that we maintain those as [fol. 189] a matter of company policy. And each year when they come up for renewal, we renew them here and then advise the plant that we have renewed them.

Q. In other words, they are renewed here in New York City; Texas offices don't have anything to do with determining whether or not they are going to be renewed?

A. That's right.

Q. Switching on to the claims section, I am sure that in a business as large as your own, there are many possibilities and many occurrences that you have an occasion to collect on this insurance; otherwise, you wouldn't carry so much?

A. That's right.

Q. Now I would like, if you would, to describe for me the process of when a claim or when a loss occurs in the Texas office, just how is it processed to you here in New York? What is the procedure?

A. They report to me by memorandum or damage report or telephone, depending on the urgency of getting through to me, that a damage has occurred.

If it is a damage against which we maintain insurance, we notify them again by telephone or memorandum that it is covered by insurance and what arrangements we [fol. 190] have made in the way of notifying underwriters in order to have the underwriters appoint a representative to inspect the damage and agree upon the cost of repairing it.

Q. Excuse me right there, Mr. Costello:

Do these underwriters maintain an office, a local office in Texas to inspect this damage to recommend whether or not it is going to be paid, or how is that done?

A. These underwriters do not have any office in Texas.

Q. How do they get this loss inspected, by what means?

A. In most cases depending upon the type of insurance, but in the majority of coverages listed here, they designate the London Salvage Association to represent them.

Q. How would you describe the London Salvage Association? What type of organization is that?

A. It is an English corporation who has for years been appointed by the English underwriters to represent them at damage surveys. They issue a bill for their services to the assured, who pays the bill.

Q. Then going back to your procedures, in notification of [fol. 191] when there is a loss, does the Galveston office correspond to the insurance brokerage office here in New York, informing them of a claim?

A. No.

Q. They do not?

A. They do not?

Q. And going through some of the correspondence a while ago I noticed that there were letters, at least with the signature, Todd Shipyards (Galveston), in parentheses, addressed to one of various brokers here in New York City. Would you explain what they are?

A. In all of my correspondence on insurance I have always used the division to which the insurance applies. That is done primarily for our own purpose in clarifying.

Q. You sign your name?

A. I sign my name; that is correct.

Q. And the Salvage Association in Texas makes an estimate or a survey of the damage; then do they correspond with you or with the brokerage about this being paid? How is that handled?

A. When they and we agree on what a proper price for repairing a damage is—

Q. Excuse me, Mr. Costello; just a minute. You say [fol. 192] they and we. Does we mean the New York office or the plant?

A. The plant; a representative of the plant.

Q. They will negotiate about the loss and the amount that is to be paid?

A. No. London Salvage Association has no authority to negotiate on anything other than what a fair price is for repairs of the damage. They do not adjust losses.

Q. I see. But your local plant in Texas would assist them in arriving at a figure of what a fair figure for the loss would be?

A. That is the usual practice. That is a fair figure for repairing a damage.

Q. Right?

A. Yes.

Q. At that time, what happens?

A. After that the Salvage Association issues its report to us which we, in turn, send through to our brokers, because underwriters will never start adjusting a claim until they have that report in front of them. When we have completed the repairs, we submit our bill in that amount, knowing in all cases that thereafter the amount of the bill will be subject to change in the adjustment of the loss.

[fol. 193] Q. Have any of these bills ever been turned down?

A. Yes, we have twelve cases among this group wherein the amount of our claim was either subsequently reduced or the entire claim rejected.

Q. In a situation where the insurer decides to either reduce the amount of the claim or to reject it entirely, what is their procedure then? Do they send someone else down to the local plant, or get in touch with another estimate group in there, or how do they handle it?

A. What happens is this? Our brokers, Johnson & Higgins, who are the adjusters and recognized as such by the underwriters, will write us and say, "This particular item doesn't appear to come under the policy." Or, "We don't think this item is collectible." And in some of those cases we recognize their right and agree to the withdrawal of the item. In other cases we don't agree that they are correct and the claim goes forward to the underwriters, who then have the privilege of raising the question, which

Johnson & Higgins or the other broker have previously indicated would be a question.

Q. When it is determined that you are or are not going to be reimbursed by the insurance company, you then communicate with the local plant?

[fol. 194] A. That is right, and tell them that a certain portion of the bill cannot be collected.

Q. Let me direct a question or two about the builders risk insurance:

If I am correct in recalling what you said generally in the definition of that type of insurance, that covers all repair work or construction work while a particular ship is in one of your plants being constructed or repaired; is that correct?

A. That is correct. If it is a ship, naturally if it is a ship on which we have arranged that type of insurance.

Q. Assume that a particular ship is coming into one of your plants in Texas. How does this office, and how does the insurance brokerage, how are they notified that this type of insurance is desired?

A. The plant notifies us that a vessel is due to arrive or has just arrived. This is not always the case. There are many cases when we in New York, before a quotation is put in on a ship repair job or a construction job, that there is going to be builders risk insurance either required by the provisions of the contract, that is specifically [fol. 195] required by the provisions of the contract, or where the provisions of the contract are such that that form of insurance is necessary to protect ourselves.

In other cases the plant notifies us that a vessel is coming in and we review the specifications or contract and determine whether builders risk is necessary. We then proceed with the arrangement of it.

Q. At the same time does the local plant notify the brokerage house that a certain ship is coming in and the people that own the ship desire this builders risk insurance?

A. No, at no time.

Q. In other words, the letter that I saw in the folder, was it the same type where you address a letter to the

brokerage house and sign "Galveston Division," the same type procedure that you follow in the others?

A. That is right. That I have always done for the purpose of identifying the plant concerned with the insurance we are arranging.

Q. And the brokerage house secures insurance or coverage from the underwriter, do they not, and then confirm insurance with the Texas plant?

A. No, at no time.

Q. At no time?

[fol. 196] A. That's right.

Mr. Shannon: Off the record.

(Discussion off the record.)

By Mr. Shannon:

Q. Mr. Costello, from what office are the premiums paid on these policies?

A. They are being paid from New York.

Q. These policies extend for a year's duration, is that correct, as a general rule?

A. Yes, that is correct, except, rather with the exception of the builders risk insurance, and the period there is from the time we receive the first material for the vessel until we deliver the vessel.

Q. About each year when the length of coverage is about to terminate, how do you determine whether or not this coverage by a particular underwriter is to be continued or not? Would you give us the process?

A. I follow the formula about a month and a half before the expiration of addressing a letter to our vice president in charge of finance here in New York, calling his attention to the policies that are expiring during that particular month, and asking if it is in order to proceed with the renewal and also asking if any change in brokers is contemplated. Then following his instructions I, therefore, proceed with the renewal arrangements.

Q. Do the insurance contracts or policies themselves, are they sent to the local plant offices?

A. No, they come to the New York office.



Q. Is a copy sent?

A. It is our custom in the case of a number of the insurances to send the plant a copy of the policy.

Q. The plant does have a copy of the policy?

A. Yes; or copy of the policy form, depending on the particular insurance.

Q. We were speaking a minute ago of the premiums on this policy. How are these premiums paid, quarterly or annually?

A. No, annually in advance. Again, with the exception of builders risk insurance, because of the fact that part of that premium is never billed to us until after the vessel has been delivered.

Q. I believe it was your statement a minute ago that this office in New York mails the drafts directly to the broker or to the underwriter, or how is that done?

A. That is our practice.

[fol. 198] Mr. Hill: To the broker.

A. To the broker. Bills are all by the broker, not by the underwriters.

Q. In case there has been a loss and the underwriter decides to pay the loss, where is the check sent, or draft sent, what office?

A. One Broadway; here in New York.

Q. Then you notify the local plant people to go ahead and repair the damaged object?

A. Yes, although in most cases it has been repaired before the loss is paid.

Mr. Shannon: Off the record.

(Discussion off the record.)

Q. Mr. Costello, this is a general question, but I would like to know besides those things that we have discussed this morning, in reference to insurance matters, are there any other transactions that are carried on from the Texas plant offices directly with the brokerage house here in New York? I say any other. Are there any?

A. No.

Q. There are none whatsoever?

A. No.

Mr. Shannon: That is all the questions I have at this [fol. 199] time, Mr. Costello.

Mr. Hill: I have some questions.

Cross examination.

By Mr. Hill:

Q. Mr. Costello, you said, or I think you said, that Todd was domiciled and had its principal office and place of business in the State of New York; is that correct?

A. That's right.

Q. With respect to these coverages which are in dispute in this litigation, the types of policies which you mentioned, have we had any history of coverages with these underwriters antedating this Texas statute, taxing the premiums?

A. Yes. Do you mean just with respect to the Galveston yards, Mr. Hill, or corporationwise?

Q. With respect to Galveston and Houston, this question.

A. Yes, we have. And in the case of the Galveston plant, it went back as far as 1934.

Q. That is for each of these coverages that we are talking about in this lawsuit?

A. With respect to the answers, with respect to those of these coverages that we carried, back that far.

[fol. 200] Q. As we picked up additional coverages, were they placed with the London underwriters?

A. From their inception.

Q. And the inception of all of those policies was prior, we will say, to 1955?

A. Yes.

Q. Mr. Costello, how long have you been with Todd Shipyards Corporation?

A. November 3, 1919.

Q. How long have you been in the insurance department, Mr. Costello?

A. Since 1922.

Q. How long have you been the manager of the insurance department?

A. Since 1940.

Q. Previous to 1940, what was your position in the insurance department?

A. General assistant to the insurance manager.

Q. So since 1940 you have handled our insurance of all types from the office here?

A. That is correct.

Q. You placed all of the types of insurance that you talked about here, the whole list of twelve?

[fol. 201] A. That is correct, yes.

Q. And you have adjusted all claims that have arisen under those policies?

A. That is right.

Q. And you have adjusted them from New York?

A. Yes.

Q. And in New York?

A. Correct.

Q. As far as you know, Ed, the insurers, the Lloyds of London, is not admitted to do business in Texas, is that correct?

A. I don't know that of my own knowledge, Mr. Hill. I would assume not, but I don't know of my own knowledge.

Q. Do you know whether they have agents or offices in Texas?

A. They do not have in Texas.

Q. I would just like to go over the method of handling these claims. Mr. Costello, you said that when a claim originates in one of the plants, you are notified in some manner by memorandum, T.W.X., or telephone call, depending on its urgency?

A. Yes.

Q. When you get the notification of a claim, what do [fol. 202] you do at that point? Do you notify the brokers?

A. Well, we get the notification, Mr. Hill, of a damage rather than a claim.

Q. Then is it up to you to determine whether or not this is the type of damage that is covered by insurance?

A. That is right.

Q. And assuming that the damage is in your opinion covered by insurance, what do you do next?

A. We then take the next step in having underwriters' representatives appointed to inspect the damage and agree upon a repair figure. That for purposes of expediting or enabling us to go ahead with the repair work.

Q. When the representative of the underwriter has agreed on the extent of the damage and the cost to repair it, does he have anything further to do with the adjustment of the claim?

A. None whatsoever.

Q. In his report, is there any notification of this fact?

A. Yes, I would think so; because all of the reports have as a concluding paragraph that the agreement on price is entirely without prejudice and subject to the terms and conditions of the policy.

[fol. 203] Q. And at that point does he drop out of this picture?

A. Completely.

Q. After you have his report, I understood you to say that you submitted it to the broker here.

A. That is right.

Q. Together with a bill for the amount of damages?

A. Which may be done simultaneously or at a different date, depending on when each document comes to me.

Q. And from that point on the broker acts as an adjuster for the underwriter; is that correct?

A. That is correct.

Q. The claim, with the approval of the broker, is submitted by him, where?

A. The broker submits his statement of claim bearing his stamp as average adjuster, to his London correspondent, who, in turn, submits it to the underwriters.

Q. Having been approved by the agent, is there ever any argument then with the underwriter as to whether or not the claim is within the policy terms and the amount is satisfactory?

A. Yes.

Q. So correspondence ensues between you and the broker [fol. 204] then?

A. That is correct.

Q. With respect to the amount of the claim or whether or not it's covered by policy terms?

A. Correct.

Q. This is eventually settled either by the rejection of the claim or the reduction of the claim; and in the event of rejection, you either agree or don't?

A. Right.

Q. In the event of a reduction, you either agree or don't?

A. Right.

Q. Assuming that you agree that the claim may be reduced, where is the payment made?

A. To the office here at 1 Broadway in New York.

Q. Assume that there is no dispute as to the validity of the claim; where is the payment made?

A. One Broadway, New York.

Q. And the procedure generally is that you submit it to the broker, and the broker submits it to the underwriter in London?

A. Right.

Q. The claim is adjusted, and the proceeds are trans-[fol. 205] mitted to the Todd Shipyards Corporation at One Broadway in New York City?

A. That's right, Mr. Hill.

Mr. Hill: Off the record.

(Discussion off the record.)

Mr. Hill: On the record.

Mr. Shannon, if it is satisfactory to you, I will ask Mr. Costello to hand to you copies of the policies involved in the litigation, and he will describe them briefly for the record. It being understood at this time that they are not being introduced in evidence, but that they are handed to you for your information with Mr. Costello's assurance that the policies, if not for the year, current year, are in exactly the same form as those for the current year.

Mr. Shannon: It is agreeable with me.

By Mr. Hill:

Q. All right, Mr. Costello, suppose you start.

A. The first of the policies are those covering Todd-owned dry docks located in the State of Texas and apply for the policy year of June 6, 1956 to June 6, 1957.

The policies for the years of 1957 to 1958, 1958 to 1959, [fol. 206] and 1959 to 1960 are not in the possession of Todd Shipyards Corporation at the present time. Inasmuch as they are in the hands of underwriters in London for the collection or for the payment of outstanding claims.

The terms and conditions of the policy for the last three years, however, are identical with those contained in the policies for the year June 6, 1956 to June 6, 1957.

Mr. Shannon: All right.

A. The next is hull and machinery insurance on leased Navy dry dock number A.F.D.M.-1, for the policy year of September 13, 1959 through September 13, 1960.

The policy covering this dry dock for the preceding years of September 13, 1957 to September 13, 1958 and September 13, 1958 to September 13, 1959, were written in identically the same form as the policies covering the year of September 13, 1959 to September 13, 1960.

Going back to that first item, which I think was hull and machinery company-owned dry docks, the policy number is 542-MD9350. And that will be policies. There are a number of them, but they all bear the same number.

Mr. Shannon: All right.

[fol. 207] A. One relating to hull and machinery insurance on the leased Navy dry dock. I should say the ones relating to. They bear policy number 542-HD3103 (handing documents to Mr. Shannon).

The next policies, number 59/BH468/JY. Do we need to name the insurance companies? These cover the piers and bulkheads at the Texas plants for the period of May 16, 1959 to May 16, 1960.

Against the risks of collision, flood, subsidence and collapse: the policies covering these same risks for the years of May 16, 1957 to May 16, 1958, and May 16, 1958 to May 16, 1959 contain the identical terms and conditions as those

set forth in the enclosed policies, for the year of May 16, 1959 to May 16, 1960 (handing documents to Mr. Shannon).

The next is pro forma copy of policies number 576 89514 covering industrial work property damage insurance for the year of September 30, 1958 to September 30, 1959. The original of these policies is presently with underwriters in London in connection with the payment of an outstanding loss. The policies covering the same risk for the years of September 30, 1957 to September 30, 1958, and September 30, 1959 to September 30, 1960, are or will be identical in [fol. 208] terms and conditions with the pro forma policies for the year of September 30, 1958 to September 30, 1959 (handing documents to Mr. Shannon).

The next policy is number 542/59/137084, and 542 59/137085, covering excess product liability insurance for the policy year of May 1, 1959 to May 1, 1960. The policies covering this same risk for the years of May 1, 1958 to May 1, 1959 are identical in terms and conditions with the policies covering the year of May 1, 1959 and May 1, 1960.

In this case we have a primary excess and an excess of that.

These are copies of both (handing documents to Mr. Shannon).

Policies number 576/91100, covering builders risk insurance on the S.S. AZTECA for the period of December 3, 1958 to December 23, 1958. All other policies of builders risk, copies of which I am handing to Mr. Shannon, contain the same terms and conditions as this policy I have described, except that they differ as to the name of the ship, the period covered and the premium paid therefor and the extent of the coverage.

In some cases we don't have the policies, but pro forma [fol. 209] copies, which I presume will serve the purpose.

Mr. Shannon: That will be all right.

A. These copies I am handing you cover the following vessels: S.S. ATZCAPOTZALCO; S.S. GENERAL LAZARO CARDENAS; S.S. VERA CRUZ; S.S. POTRERO DELLANO II.

Hull number 180; hull numbers 185 to 199. Hull numbers 181 and 182. Hull number 184. Hull number 213.



Hull number 183. Hull number 215. Hull number 204. Hulls numbers 238 and 239. Hull number 240. Hull number 179. Hulls numbers 202 and 203. Hull number 216. Hull number 217. Hulls numbers 206, 207 and 208. Hull number 209 (handing documents to Mr. Shannon).

All of these policies are written with Johnson & Higgins, Marsh and McLennon, Inc., or Griswold and Company. And the insurers in all cases are Lloyds, London and the Institute of London Underwriters.

Mr. Shannon: That is all I have.

Mr. Hill: That is all I have.

The Witness: This is true with respect to all of the policies with the exceptions of excess products liability insurance, which coverage is arranged for us by the C. R. Black, Jr., Corporation of New York, through Hogg, Robinson and Kapell-Cure (Canada), Ltd., of Toronto, Canada.

(Whereupon, the above deposition was closed.)

[fol. 210]

### *Certificate of Notary*

I, Harry Kernes, the officer before whom the foregoing deposition was taken, do hereby certify that the witness Edward W. Costello, whose testimony appears in the foregoing deposition, was duly sworn by me, that I took such testimony by stenotype, and that said deposition is a true record of the proceedings upon said deposition and of the testimony given by said witness; that I am neither attorney nor counsel for, nor related to or employed by any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially or otherwise interested in the event of the aforesaid proceeding.

In Witness Whereof, I have hereunto set my hand and seal this ..... day of November, 1959.

Harry Kernes, Notary Public.

[fol. 214]

Book 190

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS

53RD JUDICIAL DISTRICT

No. 112,081

TODD SHIPYARDS CORPORATION,

VS.

STATE BOARD OF INSURANCE, et al.

JUDGMENT—February 8, 1960

On This the 2nd day of February, 1960, came on to be heard in regular order the above entitled and numbered cause, in which Todd Shipyards Corporation, a New York corporation, is Plaintiff and the State Board of Insurance, a body politic duly created and existing under and by virtue of the laws of the State of Texas, Penn J. Jackson, individually and as a member of the State Board of Insurance, Robert W. Strain, individually and as a member of the State Board of Insurance, J. P. Gibbs, individually and as a member of the State Board of Insurance, William A. Harrison, Commissioner of Insurance, Will Wilson, Attorney General of the State of Texas, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, and Jesse James, Treasurer of the State of Texas, and each of them, are Defendants, when came each of the parties of record and announced ready for trial, whereupon the Plaintiff advised the court that David B. Irons, a Defendant because he was a member of the State Board of Insurance when this case was filed, was no longer a member of the State Board of Insurance and, therefore, the Plaintiff moved to dismiss the said Defendant, David B. Irons, and in Plaintiff's Eighth Amended Original Petition, Plaintiff joined his successor, J. P. Gibbs as Defendant, and trial by jury being waived by each and all of the parties, the court pro-

ceeded and heard the pleadings, the evidence and the argument of counsel, and after being fully apprised is of the opinion and finds that the law and the facts are with the Plaintiff, Todd Shipyards Corporation, and that Plaintiff should recover the sum of \$20,605.53 of and from the State [fol. 215] Board of Insurance and that Texas Insurance Code, Article 21.38(2)(c) is unconstitutional and void as applied to the insurance premiums described in the Plaintiff's Eighth Amended Original Petition and the taxes unlawfully exacted from Plaintiff.

It Is, Therefore, Ordered, Adjudged and Decreed by the Court that Plaintiff, Todd Shipyards Corporation, do have and recover of and from the State Board of Insurance, a body politic duly created and existing under the laws of the State of Texas, and the members of such Board in their representative capacities, Penn J. Jackson, Robert W. Strain and J. P. Gibbs, the sum of \$20,605.53 together with the pro-rata interest earned thereon while held in suspense in accordance with the provisions of Texas Revised Civil Statutes, Article 7057b.

It Is Further Ordered, Adjudged and Decreed by the Court that Jesse James, Treasurer of the State of Texas, is hereby ordered and directed to refund said \$20,605.53 together with the pro-rata interest earned thereon to Plaintiff, Todd Shipyards Corporation, by the issuance and countersigning of a Refund Warrant, in accordance with Texas Revised Civil Statutes, Article 7057b, and to take any and all other action necessary to refund said moneys to Plaintiff in accordance with Texas Revised Civil Statutes, Article 7057b.

It Is Further Ordered, Adjudged and Decreed by the Court that Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, is hereby ordered and directed to write and sign such Refund Warrant, and, after such Warrant is properly charged against the suspense account, the said Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, is hereby ordered and directed to deliver such Refund Warrant to Plaintiff, Todd Shipyards Corporation, and to take any other action neces-

sary to refund said moneys to Plaintiff in accordance with Texas Revised Civil Statutes, Article 7057b.

[fol. 216] It Is Further Ordered, Adjudged and Decreed by the Court that although this judgment is also against the Defendant, Will Wilson, Attorney General of the State of Texas, it is not necessary for him to take any action to accomplish the refund of the moneys unlawfully collected from the Plaintiff, and this judgment is entered against him only insofar as required by Texas Revised Civil Statute, Article 7057b.

It Is Further Ordered, Adjudged and Decreed by the Court that the Defendant, David B. Irons, should be and he is hereby dismissed without prejudice.

All costs incurred in this proceeding are taxed against the State Board of Insurance.

To the foregoing judgment of the Court, the Defendants, and each of them, duly excepted in open court and duly gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District, sitting at Austin, Texas.

Signed at Austin, Texas this 8th day of February, 1960.

J. Harris Gardner

Approved as to Form:

Liddell, Austin, Dawson & Huggins, By Charles R. Vickery, Jr., By Meyer W. Witt, Attorneys for Plaintiff.

Bob Eric Shannon, Assistant Attorney General, Attorney for Defendants.

[fol. 217]

[File endorsement omitted]

[fol. 219]

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS  
 53RD JUDICIAL DISTRICT  
 No. 112,081

---

TODD SHIPYARDS CORPORATION,

vs.

STATE BOARD OF INSURANCE, et al.

---

MOTION TO SEND UP ORIGINAL EXHIBITS AND PAPERS

Comes Now the plaintiff and defendant who join in this Motion that the Court order the original papers and exhibits listed below should be sent up to the Court of Civil Appeals for the Third Supreme Judicial District sitting in Austin, Texas in lieu of copies:

1. All of plaintiff's exhibits numbers 1 through 7.

Will Wilson, Attorney General of Texas, Bob E. Shannon, Assistant Attorney General.

Liddell, Austin, Dawson & Huggins, Charles R. Vickery, Jr., Attorney for Plaintiff.

---

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS  
 53 JUDICIAL DISTRICT

ORDER TO SEND UP ORIGINAL EXHIBITS—March 13, 1960

The Court being of the opinion that the original papers and exhibits listed below should be sent to the Appellate Court in lieu of copies, it is accordingly ordered that the clerk cause to be enclosed in a handy container and cause to be filed in the Court of Civil Appeals for the Third Judicial District sitting in Austin, Texas at the time the statement of facts herein is filed, the following original

papers and exhibits: to wit: 1. All of plaintiff's exhibits numbers 1 through 7.

Done at Austin, Travis County, Texas, this the 13th day of March, 1960, at 11 o'clock A. M.

J. Harris Gardner, District Judge Presiding.

[File endorsement omitted]

[fol. 225] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 226]

---

COURT OF CIVIL APPEALS  
THIRD SUPREME JUDICIAL DISTRICT  
AUSTIN, TEXAS  
No. 10,802

---

STATE BOARD OF INSURANCE et al.

vs.

TODD SHIPYARDS CORPORATION.

---

Appeal From 53 District Court of Travis County  
Opinion by Associate Justice Hughes

JUDGMENT AND ORDER IN CONNECTION WITH NOS. 3 AND 5  
OF PRAECIPE JUDGMENT—Entered November 16, 1960

This Cause came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was no error in the judgment, It is Therefore considered, adjudged and ordered that the judgment of the trial court be and same is hereby in all things affirmed; that the appellants pay all costs in this behalf expended and that this decision be certified below for observance.

[fol. 227]

IN THE COURT OF CIVIL APPEALS  
THIRD SUPREME JUDICIAL DISTRICT OF TEXAS,  
AT AUSTIN  
No. 10,802

STATE BOARD OF INSURANCE et al., Appellants,

vs.

TODD SHIPYARDS CORPORATION, Appellee.

From District Court of Travis County, 53rd Judicial District,  
No. 112,081, Honorable J. Harris Gardner, Judge.

OPINION—November 16, 1960

Todd Shipyards Corporation, appellee, sued the State Board of Insurance, its members and other state officials to recover taxes paid under protest in accordance with the provisions of Art. 7057b, V.A.C.S.

The case was tried upon stipulated facts. Judgment for appellee for the taxes paid under protest was rendered.

The sole question presented is the constitutionality of the statute under which the taxes paid by appellee were exacted. This statute is Art. 21.38, Sec. 2 (c) of the Texas Insurance Code, V.A.C.S., which we quote:

"If any person, firm, association or corporation shall purchase from an insurer not licensed in the State of Texas a policy of insurance covering risks within this State in a manner other than through an insurance agent licensed as such under the laws of the State of Texas, such person, firm, association or corporation [fol. 228] shall pay to the Board a tax of five per cent (5%) of the amount of the gross premiums paid by such insured for such insurance. Such tax shall be paid not later than thirty (30) days from the date on which such premium is paid to the unlicensed insurer."



The following material facts are taken from the stipulation of the parties.

Todd Shipyards Corporation is a New York Corporation duly licensed to do business in Texas. Since 1934 Todd has owned real and personal property located in Texas of a value in excess of \$900,000.00.

Todd has purchased insurance agreements covering Texas risks from Lloyds of London and Institute of London Underwriters of the following nature: 1. Industrial work property damage (2) Builders' risk (3) Drydocks (4) Pier and bulkhead collision (5) Product liability insurance, to the extent of the excess portion of that insurance.

Only transactions with the insurers above named are involved in this case. Each of such insurers is domiciled in London, England.

Each of the insurance agreements made the basis of the taxes involved in this suit was contracted for, delivered and paid for in New York City, New York, the domicile of Todd Shipyards Corporation.

Neither Lloyds of London nor the Institute of London Underwriters has a permit from the Texas State Board of Insurance to write insurance in Texas; neither insurer submits any statement of its condition to such Board, and the affairs of neither are subject to examination or subject to any control or supervision by such Board. Neither of such insurers has an office or agent in Texas.

Neither Lloyds of London nor the Institute of London Underwriters conducts any investigation of Texas claims in Texas, but the adjustment of losses, if, as and when occurring, are handled between Todd's agent in the New [fol. 229] York office and the agent of Lloyds of London and the Institute of London Underwriters in New York City.

Neither Lloyds of London nor the Institute of London Underwriters has ever solicited Todd's insurance business or policies within the State of Texas.

The Texas plants or offices of Todd Shipyards Corporation do not correspond directly or indirectly nor conduct any negotiations or transactions directly or indirectly with Lloyds of London or the Institute of London Underwriters but all negotiations or transactions are handled by Todd's agent, Mr. Ed Costello, in New York City with the New

York City Agents of the insurer or directly with the London office.

All decisions relative to the purchase of insurance and renewal of insurance, the extent and amount of coverage, the selection of insurers and confirmation of insurance contracts are made by Mr. Ed Costello in New York City acting for Todd Shipyards Corporation, and not in Texas.

Under these policies all losses are payable in New York City and all losses have in fact been paid in New York City. All premiums are payable in New York City and have been paid in New York City.

Todd Shipyards has its principal office, principal place of business and domicile in New York City, New York. Todd maintains and operates shipyards in New Jersey, Louisiana, Texas, California, Washington and South America.

Todd's Texas plants are located at Pelican Island in Galveston County, Texas, and on the Houston Ship Channel in Harris County, Texas. Todd duly obtained a certificate of authority to do business in Texas issued by the Secretary of State of Texas in 1934 and has maintained such certificate in good standing and has duly filed all reports and paid all taxes, fees and charges levied against Todd for the privilege of doing business as a foreign corporation in Texas.

[fol. 230] Since 1934 Todd has made large investments in real and personal properties essential to the conduct of its shipyard business which it has held and operated continuously since 1934.

Approximately 27% of Todd's volume of business was done in Texas in each of the years 1956, 1957, 1958 and 1959. The number of employees at the Texas plants varies with the amount of work, but in November, 1959, the number of employees was about 1500.

The principal type of activity performed at the Texas plants is similar to that in other plants located in other states, and the Galveston and Houston, Texas shipyards activity consists mainly of ship repair and conversion of ships from one type to another, construction of vessels, various types of metal fabrication and construction, as well as the manufacture of industrial equipment and oil burners.

Todd purchased the insurance agreements of concern here through brokers located in New York and Canada, none of whom was a licensed insurance agent under the laws of Texas.

Such policies of insurance were signed and issued in England, and they state that while actual delivery is in England that the places of delivery, at the option of the insured, may be considered to be New York City. All of such policies were accepted by Todd in New York City. Most of them were for a period of one year. All renewals were negotiated outside of Texas. No premium was paid by or from Todd's plants or offices in Texas.

Todd's New York office sends copies of all policies affecting Texas plants and risks to its Texas offices.

In the case of builders' risk insurance, Todd's Texas office notifies Mr. Ed Costello in New York, Todd's New York insurance man, that Todd has entered into a construction or repair contract. Mr. Costello then applies to one of the New York insurance brokers for builders' risk insurance coverage on that particular vessel or contract; this application letter is signed by Mr. Costello in New [fol. 231] York, an officer of the New York office, but the coverage is requested in the name of the Corporation's Texas division and identifies Texas as the place where the work is to be performed.

When a loss occurs at the Texas plants of Todd the Texas plant informs Mr. Costello at Todd's New York office by telephone or memorandum. Mr. Costello in New York then notifies in New York the New York brokerage house in New York that negotiated the insurance; the New York broker in turn appoints the London Salvage Association to prepare an estimate or "survey" of the loss. In some instances Todd's New York office notifies the London Salvage Association that a survey is requested. The Texas plant of Todd also appraises the amount of its loss. After appraisal, the London Salvage Association forwards its estimate or survey to Todd's New York office, and Todd then submits the survey to the particular insurance broker to be used in adjusting the amount of the loss. The local plant of Todd assists the London Salvage Association in arriving at a fair figure for the loss. The London Salvage

Association issues a bill to Todd Shipyards for the London Salvage Association's services, and such bill is paid in New York City by Todd Shipyards Corporation.

The adjusting of the loss is carried on by Lloyds through the insurance broker in New York and Mr. Costello in New York. The insurance broker submits its adjustment figure and recommendation to Lloyds in London and the Institute of London Underwriters for final approval. After the figure and adjustment of loss is approved, the New York office is notified by the insurance broker or the underwriter and the New York office then notifies the Texas plants that the claim will or will not be paid.

The tax levied by the State on premiums paid by Todd Shipyards Corporation on policies purchased from Lloyds of London and the Institute of London Underwriters, "un-admitted insurers," is at the rate of five per cent of the [fol. 232] gross premiums. The tax on similar premiums paid to admitted insurers and persons transacting an insurance business in the State of Texas is at rates of a maximum of 3.85% to a minimum of 1.1%, Article 21.38, Texas Insurance Code and Article 7064, V.A.C.S.

The administrative agencies of the State through which the monies collected under Sec. 2(e), *supra*, passed, treated such funds as funds derived from occupation taxes are treated.

It is the contention of appellee that Sec. 2(e), Art. 21.38, *supra*, is violative of the "due process" clauses of the Constitutions of the United States and Texas (Sec. 1, 14th Amendment, Art. 1, Sec. 19, respectively) and of the "equality and uniformity" clause of the Texas Constitution (Sees. 1 and 2, Art. 8), and the equal protection clause of the United States Constitution (Sec. 1, 14th Amendment).

We believe that invalidity and unconstitutionality of this statute is established by the opinion of the United States Supreme Court in *St. Louis Cotton Compress Company v. State of Arkansas*, 260 U.S. 346, 67 L. ed. 297, from which we quote:

"This is a suit by the state of Arkansas against a corporation of Missouri authorized to do business in Arkansas. It is brought to recover 5 per cent on the

gross premiums paid by the defendant, the plaintiff in error, for insurance upon its property in Arkansas, to companies not authorized to do business in the state. A statute of the state purports to impose a liability for this amount as a tax. Crawford & M. Dig. (1921) Sec. 9967. The answer alleged that the policies were contracted for, delivered, and paid for in St. Louis, Missouri, the domicile of the corporation, because the rates were less than those charged by companies authorized to do business in Arkansas. It also alleged that long before the taxing act was passed the defendant had made large investments in Arkansas in real and personal property essential to the conduct of its business, which it had held and operated ever since. The plaintiff demurred. The lower court overruled the demurrer, but the supreme court sustained it, holding that the statute denied to the defendant no rights guaranteed to it by the 14th Amendment. Judgment was entered for the plaintiff, and the case was brought by writ of error to this court.

"The supreme court justified the imposition as an occupation tax,—that is, as we understand it, a tax [fol. 233] upon the occupation of the defendant. But this court although bound by the construction that the supreme court may put upon the statute, is not bound by the characterization of it, so far as that characterization may bear upon the question of its constitutional effect. *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99. The short question is whether this so-called tax is saved because of the name given to it by the statute, when it has been decided in *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427, that the imposition of a round sum, called a fine, for doing the same thing, called an offense, is invalid under the 14th Amendment. It is argued that there is a distinction because the Louisiana statute prohibits (by implication) what this statute permits. But that distinction, apart from some relatively insignificant collateral consequences, is merely in the amount of the detriment imposed upon doing the act. The name given by the

statute to the imposition is not conclusive. *Bailey v. Drezel Furniture Co.*, 259 U. S. 20, 66 L. ed. 817, 21 A.L.R. 1432, 42 Sup. Ct. Rep. 449; *Lipke v. Lederer*, 259 U. S. 557, 66 L. ed. 1061, 42 Sup. Ct. Rep. 549. In Louisiana the detriment was \$1,000. Here it is 5 per cent upon the premiums,—which is 3 per cent more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the state. This case is stronger than that of *Allgeyer* in that here no act was done within the state, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside.”

Judgment sustaining the statute was reversed.

We quote from appellants' brief their answer to this case:

“The *Allgeyer*<sup>1</sup> and the *St. Louis Compress* cases were decided respectively in 1896 and 1922. Since then, the authority of those cases have been questioned in subsequent opinions by the United States Supreme Court. The emphasis of the Court now has moved away from the conceptualistic theories of place of contracting [fol. 234] and performance of the contract onto the consideration of the citizen insured or the protection of the state from the incident of loss. The *Osborn* and *Hoopeston* cases,<sup>2</sup> *supra*, make it clear that the approach taken by the court to these regulatory matters has changed. As said in the *Hoopeston* case:

“In determining the power of the State to apply its own regulatory laws to insurance business activi-

<sup>1</sup> Cited in *St. Louis Compress Co. v. Arkansas*.

<sup>2</sup> *Osborn v. Ozlin*, 310 U. S. 53, 84 L. ed. 1074, *Hoopeston v. Cullen*, 318 U.S. 313, 87 L. ed. 777.

ties, the question in the earlier cases became involved by conceptualistic discussion of theories of the place of contracting or performance. More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of those isolated factors. This interest may be measured by highly realistic consideration such as the protection of a citizen insured or the protection of a state from the incidents of loss . . . .

"The Court continued:

"The actual physical signing of the contracts may be only one element of a broad range of business activities. Business may be done in a state although those doing the business are scrupulously careful to see that not a single contract is ever signed within that state's boundaries. Important as the execution of a written contract may be, it is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.

" . . . as the analysis of those opinions clearly indicates, the Allgeyer line of decisions cannot be permitted to control cases such as this, where the public policy of the state is clear, the insured interest is located in this state and there are many points of contact between the insurer and the property in the state."

Neither the Cotton Compress case nor the Allgeyer case has been overruled. For that matter, the Court expressly declined to overrule such cases in *Compania Gen. De Tabacos v. Collector of Int. Rev.*, 275 U. S. 87, 72 L. ed. 177.

We are confident that the Supreme Court of the United States, enlightened by its own criticism of the Allgeyer and [fol. 235] Cotton Compress cases, will, upon proper application, re-examine those cases and pronounce a decision sustaining the Legislature of Texas in enacting this statute for the protection of its citizens in a field subject to rigid regulation by the State. Until such time, however, it is our



duty to follow those cases. This we do, and affirm the judgment of the Trial Court.

Robert G. Hughes, Associate Justice.

Affirmed.

Filed: November 16, 1960

[fol. 237]

---

IN THE COURT OF CIVIL APPEALS  
FOR THE THIRD SUPREME JUDICIAL DISTRICT

SITTING IN AUSTIN

No. 10802

---

STATE OF TEXAS

—v.—

TODD SHIPYARDS CORPORATION

---

APPELLANTS' MOTION FOR REHEARING—November 17, 1960

To the Honorable Court:

Now Comes the State of Texas and the other appellants in the above numbered and entitled cause, and respectfully move the Court to set aside the judgment of this Court, rendered on the 16th day of November, 1960, affirming the trial court's judgment, and to grant them a rehearing and reverse and render the trial court's judgment, and would say therefor:

1. The Court of Civil Appeals erred in holding that Article 21.38, Sec. 2, subsection (2), of the Texas Insurance Code is unconstitutional as a violation of due process, Sec. 1 of the 14th Amendment of the United States Constitution.

2. The Court of Civil Appeals erred in holding that Article 21.38, Sec. 2, subsection (2), of the Texas Insurance Code is unconstitutional as a violation of due process, Section 19, Article I of the Texas Constitution.

3. The Court of Civil Appeals erred in failing to pass on and in failing to hold that Article 21.38, Sec. 2, subsection (2) of the Texas Insurance Code is constitutional and not a violation of the equal protection clause of the United States Constitution, Section 1, 14th Amendment.

4. The Court of Civil Appeals erred in failing to pass on and in failing to hold that Article 21.38, Sec. 2, subsection (2) of the Texas Insurance Code is constitutional and not a violation of the equality and uniformity clauses of the Texas Constitution, Sections 1 and 2, Article VIII.

5. The Court of Civil Appeals erred in affirming the judgment of the trial court, and in not reversing and rendering the judgment of the trial court.

Wherefore, Premises Considered, the appellants respectfully pray that this motion be granted and that the judgment of the trial court be in all things reversed and rendered as prayed for by the appellants.

Respectfully submitted,

Will Wilson, Attorney General of Texas, Fred B. Werkenthin, Assistant Attorney General, Bob E. Shannon, Assistant Attorney General, Attorneys for Appellants, Capitol Station, Austin 11, Texas.

Proof of Service (omitted in printing).

[fol. 240]

IN THE COURT OF CIVIL APPEALS  
FOR THE THIRD SUPREME JUDICIAL DISTRICT  
AUSTIN, TEXAS

Motion #12,371

Cause #10,802

---

STATE OF TEXAS

—v.—

TODD SHIPYARDS CORPORATION

---

Appeal from 53 District Court of Travis County

ORDER OVERRULING APPELLANT'S MOTION  
FOR REHEARING—November 23, 1960

Appellant's Motion for Rehearing

Motion is submitted and overruled

[fol. 247]

---

IN THE SUPREME COURT OF TEXAS

---

STATE OF TEXAS, Petitioner

—v.—

TODD SHIPYARDS CORPORATION, Respondent.

---

APPLICATION FOR WRIT OF ERROR—Filed December 20, 1960

To the Honorable Supreme Court of Texas:

Now Comes the Petitioner, the State of Texas, and files  
this its Application for Writ of Error, and would show  
the Court the following:

### Statement of Facts

Todd Shipyards Corporation brought this lawsuit to recover taxes paid under protest pursuant to Article 21.38, Section 2, Subsection (e). The Court of Civil Appeals affirmed the trial court's action in holding Article 21.38, Section 2, Subsection (e) unconstitutional. The Court of Civil Appeals in its opinion correctly sets out the statement of facts.

### Statement of Jurisdiction

The Supreme Court has jurisdiction of this cause under Subsections 3, 4, and 6 of Article 1728.

[fol. 248]

### Points of Error

#### Point I

The Court of Civil Appeals Erred in Holding That Article 21.38, Section 2, Subsection (e), of the Texas Insurance Code Is Unconstitutional as a Violation of Due Process, Section 1 of the 14th Amendment of the United States Constitution.

#### Point II

The Court of Civil Appeals Erred in Holding That Article 21.38, Section 2, Subsection (e), of the Texas Insurance Code Is Unconstitutional as a Violation of Due Process, Section 19, Article I of the Texas Constitution.

#### Point III

The Court of Civil Appeals Erred in Failing to Pass on and in Failing to Hold That Article 21.38, Section 2, Subsection (e) of the Texas Insurance Code Is Constitutional and Not a Violation of the Equal Protection Clause of the United States Constitution, Section 1, 14th Amendment.

#### Point IV

The Court of Civil Appeals Erred in Failing to Pass on and in Failing to Hold That Article 21.38, Section 2, Subsection (e) of the Texas Insurance Code Is Constitutional

and Not a Violation of the Equality and Uniformity Clauses of the Texas Constitution, Sections 1 and 2, Article VIII.

### Point V

The Court of Civil Appeals Erred in Affirming the Judgment of the Trial Court and in Not Reversing and Rendering the Judgment of the Trial Court.

[fol. 249]

### Argument

#### Point I (Restated)

The Court of Civil Appeals Erred in Holding That Article 21.38, Section 2, Subsection (e), of the Texas Insurance Code Is Unconstitutional as a Violation of Due Process, Section 1 of the 14th Amendment of the United States Constitution.

#### Point II (Restated)

The Court of Civil Appeals Erred in Holding That Article 21.38, Section 2, Subsection (e) of the Texas Insurance Code Is Unconstitutional as a Violation of Due Process, Section 19, Article I of the Texas Constitution.

The Petitioner's first two points of error will be discussed here because, fundamentally, the same issues are involved. In this connection, it is observed that it has been held that Article I, Section 19 of the Texas Constitution restricts the powers of the Legislature to the same extent as the due process clause of Section 1 of the 14th Amendment of the United States Constitution. *Mellinger v. City of Houston*, 68 Tex. 37, 3 S. W. 249.

The insurance business has long known state regulation and Article 21.38 is only one of many measures regulating buying and selling of insurance. The primary concern of this legislation was for the protection of resident purchasers who invest in policies of companies which have not established their responsibility, financially or otherwise. The preregulated era in Texas insurance history is well known. During that period many foreign and domestic companies used every technical device and, at times, resorted to trickery and fraud to defeat and keep from pay-

[fol. 250] ing their bona fide claims and losses. Insurance companies were organized without adequate financial backing to insure their successful operation.

Texas is not singular in its regulatory control and supervision over insurance. Over the country, states early created insurance departments with duties of requiring all insurance companies doing business there to make annual financial reports and requiring examinations of the companies' books at the department's will, and authorizing them to wind up insolvent insurance companies. These states have legislation which requires foreign insurance companies doing business in the state to deposit sufficient sums to secure to resident policyholders the performance of all contracts made with them. In some states, insurance companies cannot operate unless they possess a certain amount of capital and are prohibited from accepting a single risk exceeding a specified percentage of that capital. Other statutes are designed to regulate the form of the policies to prevent the insured from being trapped by conditions of forfeitures being set out in the policy in such a way so as to escape the attention of the policyholder. Policy rates are also prescribed. Other measures, of the type of Article 21.38, regulate litigation against the insurer in order to make the remedy under this contract speedy and efficient.

Although prior to Article 21.38 the Legislature had enacted comprehensive measures designed to regulate, control, and supervise the insurance business so as to protect resident insureds, a special problem still existed: That situation where an insurance company, not incorporated in Texas, nor having a certificate of authority to do business here, but which in some way or other was still placing insurance with the residents of this State *on risks located in this State*. Such unauthorized companies in no way subjected themselves to the supervision and control of the State Board of Insurance. Such a leak in the regulatory network worked a detriment on resident policyholders since the worth of their insurance contracts purchased from unauthorized insurers was reduced to the level of the value of insurance policies in the least regulated states or countries in which that particular insurance com-

pany operated. The policy of an unregulated company might be practically worthless. As long as this leak existed, the effectiveness of the other regulatory measures was crippled. This was particularly so in fire insurance rates. One problem presented to a resident policyholder of an unauthorized company was that he, in many instances, would have to resort to bringing his lawsuit on the insurance contract in a distant forum.

Article 21.38 has two purposes, set out in the purpose clause:

(1) To regulate the placing of insurance by resident insureds with unauthorized insurers

(2) To subject those unauthorized insurers to the jurisdiction of Texas in suits by the resident insureds

Although the second purpose forms an integral part of Article 21.38, we are primarily concerned with the first purpose. In Section 2 of Article 21.38, the mode of regulation is set out. Subsections (a), (b) and (c) of Section 2 provide for licensing of certain insurance agents to sell insurance of unauthorized insurers to resident insureds who show by affidavit that they are unable to procure from licensed companies the full amount of insurance required [fol. 252] for the particular risk. The agent is required to pay a 5% tax on the gross premiums paid by the insured on the policies of the unauthorized insurer.

Subsection (c) sets out an alternative route for the resident insured to buy insurance from an unauthorized insurer: he may purchase insurance of an unauthorized insurer from one other than a licensed agent, but the insured must pay a 5% tax on the gross premiums paid.

Subsection (c) of Section 2 of Article 21.38, as it can be seen, is concerned with the *resident* owners of Texas risks purchasing insurance from unauthorized insurers. It confines itself to risks located in Texas and which are owned by or are the responsibility of residents. It also confines itself to unauthorized insurers, i.e., insurers who are not licensed to do business in this State. This means it could apply to insurance companies incorporated in other countries, companies incorporated in other states in this country,



and companies incorporated in this State but which have not complied with the laws of this State in some respect so as not to entitle them to a certificate to do business here. A reading of Section 2 reveals that the tax is placed upon the *resident purchaser of the insurance*, covering property or risks in this State, and so it is readily seen then that the tax is *not* placed on the *unauthorized* insurer, which in this case is domiciled in England. There is no question in this case of the State attempting to regulate or tax the activities of the unauthorized insurance company. The question concerns the power of Texas over insured property located here.

The various states have long exercised powers over property located within their respective jurisdictions. As said in *Hoopeston v. Cullen*, 318 U. S. 313 (1942):

[fol. 253] "A state may make flood control, quarantine, conservation and zoning regulations affecting the property within its bounds. It is a source of law for the forms of conveyances, the nature of covenants, future interest and easements, for the construction of wills, trusts and mortgages, and for many other legal principles affecting property interests. Contracts made in other states may remain subject to the law of the State of the situs of the property, particularly in respect to immoveables. *There is no more reason to bar the state from authority over the insurance of the property within it than to exclude it from control of all the property interests mentioned.*" (Emphasis added.)

The State has a valid interest in the use of properties located within its boundaries because it is called upon to extend police protection to those properties. In exchange for the protection afforded by the State, it may and does restrict the use of those properties in many ways. This interest in the use of property extends in some instances to the supervision and regulation of the kind and quantity of insurance coverage on that property. For example, employers of certain classes are required to purchase workmen's compensation insurances, or in the case of accident, experience certain consequences. More closely in point is the Motor Vehicle Responsibility Law requiring all

owners of motor vehicles, after an accident, to show financial responsibility before they are allowed to continue to drive on the highways. Such owners do not have to purchase insurance or show other financial responsibility, but in case of an accident, their failure to purchase insurance may cause them to suffer certain consequences imposed by law. Quoting from another case, the Texas Supreme Court has said:

"It seems clear the Legislature may require, as a condition to the right of operating a motor vehicle, the [fol. 254] procurement of insurance or the furnishing of other proof of financial responsibility." *Gillespie v. Department of Public Safety*, 152 Tex. 459, 259 S. W. 2d 177, 182, (1953) certiorari denied, 347 U. S. 433.

Then it may be seen that the State can require that owners of property, in order to use that property, purchase certain types of insurance or produce other security. The State requires in the Motor Vehicle Responsibility Law, Article 6701b, V. T. C. S., Section 19, Section 21, Section 5, that the liability insurance purchased be that of authorized insurers. If this were not so, the purpose of the financial Motor Vehicle Responsibility Law would be wrecked. The State Legislature has determined by various laws that the risks of Texas residents can be best protected by placing those risks with controlled and supervised companies, i.e., authorized companies. Subsection (e) of Section 2 of Article 21.38 does not forbid resident owners of property or risks to place insurance with unauthorized insurance companies, but, if they wish to do so, they must pay a 5% tax on the gross premiums paid to the insurance company. It can be seen that Article 21.38, by means of this levy, reduces the number of unwary residents who hold policies with unlicensed and unsupervised companies. It has long been recognized that taxation may be made the implement of the exercise of the State's police power. See *Great Atlantic & Pacific Tea Company v. Grosgean*, 301 U. S. 412 (1937).

Even though extra-territorial repercussions may ensue from the application of Subsection (e) of Section 2 of Article 21.38 to this case, it is well settled that a state may

validly regulate activities, persons, and properties within its jurisdiction despite the ensuing repercussions. The [fol. 255] propriety of the regulation is determined by its focus upon an internal problem and not by the extent of its influence.

"Some contracts made locally, affecting nothing but local affairs, may well justify a denial to other states of power to alter those contracts. But, as this case illustrates, a vast part of the business affairs of this nation does not present such simple local situations . . . As a consequence of the modern practice of conducting widespread business activities throughout the entire United States, this Court in a series of cases held that more states than one may seize hold of local activities which are part of multistate transactions and may regulate to protect interests of its own people, even though other phases of the same transactions might justify regulatory legislation in other states . . . " *Watson v. Employers Liability Corporation*, 348 U. S. 66 (1954).

"The mere fact that State action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *Osborn v. Ozlin*, 310 U. S. 53 (1940).

Involved in *Osborn v. Ozlin* was a Virginia statute which forbade contracts of insurance or surety by companies authorized to do business in Virginia except through regularly constituted and registered resident agents or agencies of such companies. Violation of the statute might entail a fine or revocation of the corporate license in Virginia. The statute was enacted to remedy this situation: The Virginia assureds could buy insurance at lower rates out of state from brokerage houses than from the local agents, and the company could save on the local agent's commissions. Thus the Virginia insurance business was being drained away to the great insurance centers, to the detriment of the local agents. The complainants had purchased their insurance out of state. The complainants objected that in affecting

the cost of the master policy Virginia intruded upon business transactions beyond its borders.

[fol. 256] The Court answered that contention:

"But the question is not whether what Virginia has done will restrict appellant's freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids . . . Our inquiry must be much narrower. It is whether Virginia has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere . . ."

"Virginia has not sought to prohibit the making of contracts beyond her borders. She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia, and Virginia's regulation of it."

" . . . Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition. The state may fix insurance rates . . . ; it may regulate the compensation of agents . . . ; it may curtail drastically the area of free contract . . . States have controlled the expenses of insurance companies . . . They have also promoted insurance through savings banks; . . . In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business . . . If the state, as to local risks, could thus preempt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents

shall have a share in devising and safeguarding protection against its local hazards." (Cases cited have been omitted.)

As it may be noticed, the Virginia statute regulated insurance companies directly. There involved were insurance contracts made out of state. The Court held that the interest of Virginia in the domestic risks warranted the kind [fol. 257] of control she imposed. In the case at bar, the argument for the validity of Article 21.38 is much stronger than the Virginia regulation since Article 21.38 is drawn to place its burden on the *resident risk owner* and not on the unauthorized insurer. Since this is so, there is no burden on the State to show that Lloyds of London, by some act, "did business" in this State.

The rule of the *Ozlin* case, (the *Hoopston* case, and *Travelers Health Association v. Virginia*, 339 U. S. 643 (1950), make this apparent: As to the validity of a regulatory measure, it is no longer of paramount importance *where the contract of insurance was entered into*. The question becomes whether the regulating state has sufficient interest in the matter to justify the regulation. What, then, is the interest of Texas in these contracts? The intimacy of the insurance contracts in question with Texas and the interest of Texas is readily apparent from the fact that the insured is a Texas resident and the property and risks involved are located in Texas. The events which give rise to contractual obligation on the part of the insurance company to pay on policies will occur in Texas. The State or its instrumentalities will be called upon to extend its police protection in case of losses by the insured. The failure of an unauthorized insurance company to pay for large losses could cause serious economic consequences to communities in this State, with the ensuing burden on the State to supply relief measures. In case of the builder's risk insurance, at least, the persons compensated more than likely will be residents of Texas. Upon them will devolve the task of bringing suit in the event Lloyds of London denies the risk. Persons bringing suit on these risks will more than likely resort to Texas courts. In the more recent United States Supreme Court cases, the Court has em-

[fol. 258] phasized the great importance of the location of the property as a factor in justifying state's control over insurance contracts made outside the boundaries of the state. See *Osborn* and *Hoopeston* cases, *supra*, and language in *Parmalee v. Iowa State Traveling Men's Ass'n.*, 206 F. 2d 518, pp. 521 (1953). In fact, it may be said that the location of the property insured was the decisive factor in the *Hoopeston* case. See pages 318 and 319.

As noted by the *Osborn* case, *supra*, the view taken by the Court in deciding the constitutionality of this statute must not be by the process of abstracting these few isolated contracts written in New York from the organic whole of the insurance business, the effect of that business in Texas, and Texas' regulation of it. The need for Article 21.38 has already been set out—the effectiveness of the regulatory scheme of insurance in Texas was being greatly impaired by the machination of the unauthorized insurer operating in distant areas.

Some of the same issues are considered in the conflict-of-laws cases. It has been long settled that a state may constitutionally refuse to enforce an insurance contract or provision thereof even though made in another state because its enforcement would be contrary to the policy of that state. In *Watson v. Employers Liability Corporation*, 348 U. S. 66 (1954), the applicability of the Louisiana direct action law to an insurance contract made in Massachusetts was involved. The plaintiff was injured in Louisiana while using a product of the insured. The insurance company contended that since the contract involved was a Massachusetts contract which forbade the plaintiff suing directly, the Louisiana direct action statute was an invalid attempt to regulate and control activities wholly beyond Louisiana boundaries. The court held Louisiana had a valid interest [fol. 259] in the Massachusetts contract and, as such, could apply its laws to it, and that it was immaterial that other states might also have an interest in the same transaction and might also regulate it.

Even more pertinent to the case at bar is the proposition that the state, as a sanction against unauthorized insurers and for the protection of residents, have long denied to the unauthorized insurer access to their courts to

enforce its rights under the insurance contract to resident purchasers. A case in point is *American Universal Insurance Company v. Sterling*, 203 F. 2d 159 (1953). There an unauthorized insurance company brought suit against its insured in Pennsylvania for breach of the cooperation clause and subrogation agreement. The defense was that since the suit was based upon insurance contracts issued by a foreign company which had not complied with the Pennsylvania statutes such suit could not be maintained in the courts of Pennsylvania. This defense was said to be based upon Pennsylvania public policy. This insurance was written in Rhode Island and delivered to the defendant in New York. Relying on *Swing v. Munson*, 191 Pa. 582, 43 A. 342, (to determine the Pennsylvania policy), the Court determined that the contract was not of the type which could be enforced in the Pennsylvania courts. (The Court allowed the plaintiff to amend its petition on another point.) The Court says that the three facts involved in the *Swing* case were:

- (1) "The failure to comply with the Pennsylvania statute;
- (2) the Pennsylvania citizenship of the defendant;
- (3) and the location within the Commonwealth of the insured property."

[fol. 260] The Supreme Court concluded (in the *Swing* case) that the writing of the insurance contract, although accomplished in Ohio, was "the attempt of a foreign insurance company to do business in this state in violation of the laws of this state."

Interesting also is the relatively new case of *McGee v. International Life Insurance*, 355 U. S. 220 (1957). It involved the question of whether due process was violated in the service of an out-of-state corporation, and illustrates the principles guiding the Court in determining the "interest" of a state in an insurance contract to gain jurisdiction over the foreign insurance company. In determining the interest of California in the insurance contract, the Court considered: that the insurance contract



was delivered in California; the premiums were mailed from there; the insured was a resident of California; the necessity of California to provide an effective means for redress for its residents who are refused claims; the cost to the insured of bringing suit in the forum of the foreign insurance company; and the availability of witnesses in the insured's locality.

The Respondent maintains that Section 2 of Article 21.38 is unconstitutional as a tax on matters outside the jurisdiction of Texas and relies on the authority of the cases of *Allgeyer v. Louisiana*, 165 U. S. 578 (1896) and *St. Louis Cotton Compress Company v. State of Arkansas*, 260 U. S. 347 (1922). In the *Allgeyer* case, a Louisiana statute levied a thousand dollar fine on any person who by any act in Louisiana effected for himself or others insurance from an insurance company not licensed in Louisiana. The defendant, Allgeyer & Co., mailed a letter from Louisiana [fol. 261] to a New York insurance Company in New York, informing the insurance company of a shipment of one hundred bales of cotton from Louisiana which effected insurance on the cotton in accordance with an open marine policy. The Court took the view that the insurance contract involved was a New York contract and, as such, was not subject to the jurisdiction of Louisiana. The Court noted that the property to be insured, the one hundred bales of cotton, was *temporarily* within Louisiana. It is to be noted that in the case at bar, the property insured has long been located in Texas and, consequently, has long enjoyed the protection extended by the State.

Following the *Allgeyer* decision, the Court in the *St. Louis Cotton Compress* case, *supra*, invalidated an Arkansas tax placed on insurance premiums paid by Arkansas property holders to insurance companies not authorized to do business in Arkansas. The policies in question were contracted for, delivered, and paid for in St. Louis, Missouri. The reason given for holding the measure invalid seemed to have been that since the policies were contracted for outside the state, the Arkansas measure was an interference or regulation with matters outside Arkansas. The Court of Civil Appeals followed the *St. Louis Compress* case.

The *Allgeyer* and the *St. Louis Compress* cases were decided respectively in 1896 and 1922. Since then, the authority of those cases have been questioned in subsequent opinions by the United States Supreme Court. The authority of the *Allgeyer* case has been questioned to such an extent that one writer has said, "Although the *Allgeyer* case has never been overruled, it is doubtful whether the Supreme Court would reach the same result today, even upon the precise fact situation involved." (Annotation to *California Automobile Ass'n. v. Maloney*, 341 U. S. 105, (1950) appearing in 95 L. Ed. 805.) The Court of Civil [fol. 262] Appeals, though affirming the trial court's judgment, stated that:

"We are confident that the Supreme Court of the United States, enlightened by its own criticism of the *Allgeyer* and *Cotton Compress* case, will, upon proper application, re-examine those cases and pronounce a decision sustaining the Legislature of Texas in enacting this statute for the protection of its citizens in a field subject to rigid regulation by the State."

The emphasis of the United States Supreme Court now has moved away from the conceptualistic theories of place of contracting and performance of the contract onto the consideration of the citizen insured or the protection of the state from the incident of loss. The *Osborn* and *Hoopeston* cases, *supra*, make it clear that the approach taken by the Court to these regulatory matters has changed. As said in the *Hoopeston* case:

"In determining the power of the State to apply its own regulatory laws to insurance business activities, the question in the earlier cases became involved by conceptualistic discussion of theories of the place of contracting or performance. More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of those isolated factors. This interest may be measured by highly realistic consideration such as the protection of a citizen insured or the protection of a state from the incidents of loss . . ."

The Court continued:

"The actual physical signing of the contract may be only one element of a broad range of business activities. Business may be done in a state although those doing the business are scrupulously careful to see that not a single contract is ever signed within that state's boundaries. Important as the execution of a written contract may be, it is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.

" . . . as the analysis of those opinions clearly indicates, the Allgeyer line of decisions cannot be permitted to control cases such as this, where the public [fol. 263] policy of the state is clear, the insured interest is located in this state and there are many points of contract between the insurer and the property in the state."

#### Point III (Restated)

The Court of Civil Appeals Erred in Failing to Pass on and in Failing to Hold That Article 21.38, Section 2, Subsection (e) of the Texas Insurance Code Is Constitutional and Not a Violation of the Equal Protection Clause of the United States Constitution, Section 1, 14th Amendment.

#### Point IV (Restated)

The Court of Civil Appeals Erred in Failing to Pass on and in Failing to Hold That Article 21.38, Section 2, Subsection (e) of the Texas Insurance Code Is Constitutional and Not a Violation and (sic) the Equality and Uniformity Clauses of the Texas Constitution, Sections 1 and 2, Article VIII.

The trial court held that Subsection (e) of Section 2, Article 21.38, was a violation of Sections 1 and 2 of Article VIII of the Texas Constitution and a denial of the equal protection clause of the 14th Amendment of the United States Constitution. The Court of Civil Appeals failed to pass on these points.

Section 1 of Article VIII reads in part as follows:

“Taxation shall be equal and uniform.”

Section 2 of Article VIII reads in part as follows:

“All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax . . . ”

[fol. 264] It is well settled that the effect of the equal protection clause of the 14th Amendment of the United States Constitution and the equality and uniformity requirements of the Texas Constitution upon the taxing power of the state are substantially similar. *Hurt v. Cooper*, 130 Tex. 433, 110 S. W. 2d 896, 901 (1937). For this reason, Petitioner's Points III and IV will be discussed herein.

In the beginning, it is well to note that authorized insurance companies doing business in Texas actually carry a tax burden which is as great or perhaps greater than that imposed by Article 21.38, Section 2(e). Texas has a complete and comprehensive system of taxation with respect to insurance, irrespective of how or with whom such insurance is placed by persons residing in Texas who have risks located in Texas. Thus, Section 7064 of Vernon's Civil Statutes imposes a premium tax on all admitted companies, domestic, foreign, or alien, of 3.85% (subject to reduction, depending upon the investment portfolio of the company) on the gross premiums received from policyholders during the preceding calendar year, upon property or risks located in Texas. These tax proceeds become part of the general fund and are used to support all services, including education, furnished to persons resident and domiciled in the State of Texas.

In addition to the premium taxes which are borne by residents of Texas, there are also imposed four kinds of maintenance taxes which are likewise based on gross premiums. They are:

- [fol. 265] (1) The Fire Insurance Maintenance Tax (Article 5.49, Insurance Code);
- (2) The Casualty Insurance Maintenance Tax (Article 5.24, Insurance Code);

- (3) The Motor Vehicle Division Tax (Article 5.12, Insurance Code); and
- (4) The Workmen's Compensation Insurance Commission Tax (Article 5.68, Insurance Code).

These taxes may be assessed at rates ranging from 0.2% to 1¼%, depending upon the kind of coverage.

These taxes are used to benefit persons who are resident or domiciled in Texas by defraying the expenses of the various insurance divisions which are charged with supervising insurance, fire prevention, accident prevention, and the like, in the public interest.

These taxes alone aggregate 5% or more of the gross premiums charged, and this does not take into account various agency fees, filing fees, and other taxes and fees which are ultimately borne by policyholders who purchase coverage from admitted insurers, whether such insurers be domestic, foreign, or alien.

Should a policyholder elect to procure his insurance from unauthorized or non-admitted insurers through a surplus lines agent in the State of Texas, the agent is obligated to collect from the insured and remit to the State Board of Insurance a tax of 5% on the gross premiums charged for such coverage (Article 21.38, (2)(d)). The proceeds from this tax became part of the general fund of the State, the same as the taxes imposed upon admitted insurers. The [fol. 266] funds which are appropriated and expended are likewise used to promote and protect the best interest of all persons resident or domiciled in the State of Texas.

In 1957, Article 21.38 was amended in order to equalize the tax burden on Texas residents. The amendment placed a tax at the same rate upon any person who purchased a policy of insurance covering risks located in Texas in a manner other than through a licensed surplus lines agent. In other words, by virtue of the amendment, the tax became identical; to wit, 5% on the gross premiums charged for insurance purchased from unauthorized insurers whether the same was obtained through the intervention of a licensed Texas surplus lines agent or through the medium of an out-of-State, licensed or unlicensed broker or agent. Both the title and the body of the Act make it patent that

the purpose of the amendment was to impose a tax, and that the tax should be at the same 5% rate on the premium charged for insurance procured by residents of Texas, covering risks located within the State of Texas, irrespective of how such insurance is effected. The measure of the tax, while keyed to gross premium, is nevertheless limited to risks resident or located within the State of Texas. In this connection, Subsection (f) of Section 2 of Article 21.38 expressly provides:

“(f) If any such policy purchased from an insurer not licensed in this State, either by purchase from such insurer or through an agent licensed hereunder, shall cover risks partially within and partially without this State, the tax levied in Subdivisions (d) [i.e. the 5% tax where the coverage is procured through a surplus lines agent] and (e) above [where the coverage is procured other than through a surplus lines agent] is to be measured only by that portion of the premium paid for insurance covering risks within this State.”

Texas is thus seeking to tax only insurance effected by persons within its State, on property within its own jurisdictional confines, and is not seeking to extend its jurisdiction to risks outside the State of Texas.

So it may be seen that irrespective of whether the coverage is placed with an admitted or an unauthorized insurer, or the manner in which it is effected, the maximum rate is identical and, if not identical, the rate is preponderantly lower in the case of non-admitted insurance than it is in the case of admitted insurance.

It is well settled law that a state may classify persons and objects for the purposes of taxation. *Texas Company v. Stevens*, 100 Tex. 628, 103 S. W. 481, (1907). It is equally well settled that the equality and uniformity provisions and the equal protection clause are satisfied if the legislation meets two tests:

(1) Is the classification reasonable, or, in other words, does the classification have a proper connection with the object sought by the legislation?

(2) Within the class, does the legislation operate equally?

What is the class created by Subsection (e) of Section 2 of Article 21.38? The class created by this law is composed of any person, firm, association, or corporation who purchases insurance covering risks within this State from an unauthorized insurer. Upon this class of persons is placed a 5% tax of the gross premiums paid to the unauthorized insurer.

[fol. 268] Is this classification reasonable, i.e., does the classification have a proper connection with the object sought by the legislation? In an earlier part of this application, the purpose or object of this legislation was set out in detail and here is a brief recapitulation to show the reasonableness of this legislation.

Sharp practices of the insurance trade in the pre-regulated era are well known. Early in the legislative history of this State, enactments were passed which attempted to protect the insuring public from unscrupulous insurance tactics. At the present time, an elaborate system of laws regulate insurance companies operating in this State to insure financial stability, competent and honest management, and to insure that the policy rates and forms are reasonable and uniform. Even with an elaborate system of laws in effect, the Legislature realized that persons, associations, or corporations owning property in this State were still being sold insurance by unregulated insurers. These insurers were sometimes domestic companies which had not complied with the Texas Insurance Code. In other instances, they were insurance companies organized in other states with lax legal requirements; and in some instances, these companies were foreign companies organized in foreign countries which imposed no regulations whatsoever. When such an unauthorized company could not or would not perform its contractual obligation, the State of Texas, through the insured, would bear the economic consequences. In many instances, the person, association, or corporation purchasing from such unauthorized insurers [fol. 269] was unaware of the hazards of insuring with an unauthorized company.



For the protection of the unwary property owner seeking insurance, this law was passed. By placing a 5% tax on the gross premiums paid by the insured to the unauthorized insurer, the Legislature could at least reduce the volume of this dangerous traffic. Most property owners would buy insurance from authorized insurers, and, of course, such a deterrent as a tax was not needed in that case. It was in just this instance—purchasers of insurance from unauthorized insurers—that a tax deterrent was needed. From these persons, the class in Subsection (e) of Section 2 of Article 21.38 was created.

Within the class created by Subsection (e) of Section 2, Article 21.38, the law operates uniformly and equally upon all members of the class. The class created by this section is all persons, firms, associations, or corporations which shall purchase from unauthorized insurers insurance covering risks located within this State, and such persons, firms, associations, or corporations shall pay a 5% tax. Certainly this is an all-encompassing inclusion of all those within the class—no one so purchasing such insurance is excluded. Also, all must pay the same amount of tax—5%.

Respondent depended upon *Rouw v. Texas Citrus Commission*, 151 Tex. 182, 247 S.W. 2d 231, in the trial court. That case involved this second question: Within the class, are all members taxed equally? There the Legislature levied a tax upon persons, firms, associations, and corporations growing citrus fruit. But an exemption to the tax [fol. 270] was provided to "natural persons" growing citrus fruit. Clearly, then, all members of the class were not taxed equally. The case before this Court is clearly distinguishable from the *Rouw* case since Subsection (e), Section 2, Article 21.38, is applicable to *all* persons who purchase from unauthorized insurers.

### Conclusion

For the reasons set forth in this application, the State of Texas respectfully submits that Subsection (e) of Section 2, Article 21.38, Texas Insurance Code, is a valid and constitutional measure, and that the judgment of the Court

of Civil Appeals should be reversed, and that the judgment of the District Court should be reversed, and rendered for the State of Texas.

Respectfully submitted,

Will Wilson, Attorney General of Texas; Fred B. Werkenthin, Assistant Attorney General; Bob E. Shannon, Assistant Attorney General, Counsel for Petitioner, State of Texas, Capitol Station, Austin 11, Texas.

[fol. 271] Certificate of Service (omitted in printing).

[fol. 272] Clerk's Certificate to foregoing paper (omitted in printing).

---

[fol. 273] [File endorsement omitted]

[fol. 274]

IN THE SUPREME COURT OF THE STATE OF TEXAS

No. A-8150

---

STATE BOARD OF INSURANCE, et al., Petitioners,

v.

TODD SHIPYARDS CORPORATION, Respondent.

---

INSTRUMENT TO CLARIFY THE IDENTITY OF PETITIONERS  
—Filed December 22, 1960

To the Honorable Supreme Court of Texas:

It has come to the attention of the Petitioners that the identity of each should be more clearly disclosed, and this instrument is filed to serve that purpose.

The Respondent, Todd Shipyards Corporation, obtained, in the 53rd District Court, Travis County, Texas, judgment against Penn J. Jackson, individually and as a member of the State Board of Insurance; Robert W. Strain, individually and as a member of the State Board of In-

insurance; David Irons, individually and as a member of the State Board of Insurance (the position subsequently occupied by Joe P. Gibbs, and presently occupied by Ned Price); William A. Harrison, Commissioner of Insurance; Will Wilson, Attorney General of Texas; Robert S. Calvert, Comptroller of Public Accounts of the State of Texas; and Jesse James, Treasurer of the State of Texas.

[fol. 275] The foregoing named individuals, in their several capacities, were the Appellants in the Court of Civil Appeals in Cause No. 10802, and those same individuals, in their several capacities, are Petitioners in Cause No. A-8150, Application for Writ of Error now pending in the Supreme Court of Texas. For simplicity and brevity, the collective term "State of Texas" was used in the briefs in the Court of Civil Appeals and in the application for a writ of error now pending in the Supreme Court.

Respectfully submitted,

Will Wilson, Attorney General of Texas, Fred B. Werkenthin, Assistant Attorney General, Bob E. Shannon, Assistant Attorney General, Counsel for Petitioners, State Board of Insurance, et al., Capitol Station, Austin 11, Texas.

[fol. 276] Clerk's Certificate to foregoing paper (omitted in printing).

---

[fol. 277] [File endorsement omitted]

[fol. 285]

IN THE SUPREME COURT OF THE STATE OF TEXAS

No. A-8150

[Title omitted]

ANSWER TO APPLICATION FOR WRIT OF ERROR AND  
RESPONDENT'S BRIEF—Filed December 30, 1960

To the Supreme Court of the State of Texas:

Respondent, Todd Shipyards Corporation, respectfully files this Answer to Petitioners' Application for Writ of

Error in order to clarify the controlling issues and authorities.

### Statement of the Case

(1)

#### *Preliminary Statement*

The Court of Civil Appeals (1) affirmed the Trial Court's judgment refunding Respondent's taxes paid under protest [fol. 286] and (2) declared the unadmitted insurance tax (Article 21.38(2)(e)) an unconstitutional violation of due process.

(2)

#### *The Issues Presented*

The issues presented were correctly summarized in the Court of Civil Appeals opinion:

1. "The sole question presented is the constitutionality of the statute under which the taxes paid by appellee (Respondent) were exacted." (C.C.A. Opinion, p. 1)
2. "It is the contention of appellee (Respondent) that Sec. 2(e), Art. 21.38, supra, is violative of the 'due process' clauses of the Constitutions of the United States and Texas (Sec. I, 14th Amendment, Art. 1, Sec. 19, respectively) and of the 'equality and uniformity' clauses of the Texas Constitution (Sees. 1 and 2, Art. 8) and the equal protection clause of the United States Constitution (Sec. 1, 14th Amendment)." (C.C.A. Opinion, p. 6)

The Court of Civil Appeals condemned the tax on the due process points and did not reach nor decide the "equality" points under the Texas and United States Constitutions.

The "jugular vein" of this case is easily identified:

Are the Texas Courts Bound to Follow *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346?

[fol. 287] Respondent and the lower courts answer "Yes", while Petitioner answers "No".

### Statement of Points

#### Counter-Point No. 1

The Texas Unadmitted Insurance Tax Levied on Insurance Premiums Paid by Respondent in New York to New York Brokers Is Unconstitutional and Void Under the Due Process Clause of the Texas Constitution (Article I, Section 19) and United States Constitution (Amendment Fourteen), Because (1) the Insurance Agreements Were Made in New York, New York, (2) the Policies Were Delivered in New York, and the Premiums Were Paid in New York, (3) the London Insurers Were Not Authorized to Do Business, and Were Not Doing Business in Texas, and, Therefore, (4) the State of Texas Had No Jurisdiction to Tax the New York Contract or New York Premium Payments as Established by *St. Louis Cotton Compress Co. v. State of Arkansas*, 260 U.S. 346.

#### Counter-Point No. 2

The Texas Unadmitted Insurance Tax Levied on Insurance Premiums Paid by Respondent in New York to Unadmitted Insurers Is Unconstitutional and Void Under the Equality and Uniformity Clauses of the Texas Constitution, Because (1) the Unadmitted Insurance Tax Is an Arbitrary, Unreasonable and Invidious Discrimination Against Foreign Insurers and in Favor of Domestic Insurers, and (2) All Persons Paying Insurance Premiums on Policies Covering Texas Risks Are Not Taxed Equally and Uniformly, and, Therefore, the Tax Denies Equality and Uniformity as Guaranteed by the Texas Constitution, Article 8, Sections 1 and 2.

#### Counter-Point No. 3

The Texas Unadmitted Insurance Tax Levied on Insurance Premiums Paid by Respondent in New York to Unadmitted Insurers Is Unconstitutional and Void Under the Equal Protection Clause of the United States Constitution's Four-

teenth Amendment, Because (1) the Unadmitted Insurance [fol. 288] Tax Is an Arbitrary and Unreasonable Discrimination Against Unadmitted Insurers in Favor of Admitted Insurers, and (2) All Persons Paying Insurance Premiums on Policies Covering Texas Risks Are Not Taxed Equally, and Therefore, the Tax Denies Equal Protection of the Laws as Guaranteed by the United States Constitution's Fourteenth Amendment and Is Invalid and Void.

### Argument Under Counterpoint No. 1

#### (1)

This Case Is Controlled by Binding and Indistinguishable United States Supreme Court Authority.

The Court of Civil Appeals (C.C.A. Opinion, p. <sup>27</sup>~~7~~) correctly declared that the unconstitutionality of the unadmitted insurance tax is well settled:

"We believe that invalidity and unconstitutionality of this statute is established by the opinion of the United States Supreme Court in *St. Louis Compress Company v. State of Arkansas*, 260 U.S. 346, 67 L. ed. 297. . . ."

*St. Louis Compress* is a square holding denouncing the unadmitted insurance tax on facts substantially identical to the case at bar. Petitioners do not attempt to distinguish *St. Louis Compress* but only suggest its authority may be stale.

Therefore, the constitutionality of the unadmitted insurance tax is not an open question, and Petitioners' bold suggestion that this Court should attempt to overrule *St. Louis Compress* is untenable.

Each of the pertinent facts set forth in the *St. Louis Compress* opinion is admitted in the factual stipulation [fol. 289] between Petitioners and Respondent.

Respondent's position and the Texas tax are identical to *St. Louis Cotton Compress Company's* position and the Arkansas tax, and the Texas tax is a clearly unconstitutional attempt to tax Respondent's activities in New York.

Certainly, strong and unequivocal Supreme Court holdings must prevail over Petitioners' prophecy that the *St. Louis Compress* line of authority may be overruled. As pointed out by the *Court of Civil Appeals* (Opinion, p. 9) in *Compania General De Tabacos De Filipinas v. C. I. R.*, 275 U.S. 87, *St. Louis Compress* was reaffirmed where the insurer *had no permit* to do business and was distinguished where the insurer *had a permit* to do business. This distinction is not applicable to Respondent, since neither of its insurers has a permit to do business in Texas.

Moreover, *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1937), condemns as a due process violation, a California tax on reinsurance premiums paid to a Connecticut corporation admitted in California on contracts of reinsurance entered in Connecticut where the premiums were paid and the losses were payable. The court wrote:

"But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by *reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it.* Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. *But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere.* . . .

"Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. . . . Apart from the facts that appellant was privileged to do business in California, and



that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. *No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection.*

"... All that appellant did in effecting the reinsurance was done without the state *and for its transaction no privilege or license by California was needed.* The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state." §  
(Emphasis added)

The *Johnson* case squarely condemns an extra-territorial tax similar to that attempted to be levied on Respondent, even though the insurer had a permit to do business in the taxing jurisdiction.

The same due process jurisdiction rule is enforced in *Allgeyer v. Louisiana*, 165 U.S. 578, condemning a fine imposed for insuring with unauthorized insurers in other states.

The United States Supreme Court in *St. Louis Compress and Compania General De Tabacos De Fil*, condemned [fol. 291] statutes substantially identical to Article 21.38 (2)(c). Substantially identical statutes were also condemned by the Supreme Court of Vermont in *State v. International Paper Co.*, 120 Atl. 900, and the Supreme Court of Idaho in *Hyatt v. Blackwell Lumber Co.*, 173 P. 1083.

In forty years at the bar, many courts have condemned the unadmitted insurance tax levied against Respondent. *Yet, Not One Single Case, Either State or Federal, Has Ever Upheld This Tax.*

(2)

Petitioner Makes No Effort to Distinguish *St. Louis Compress*, *Compania General Tabacos* or *Connecticut General Life Insurance Company*.

After virtually admitting the force of *St. Louis Compress*, Petitioner attacks *St. Louis Compress* with this statement:

"The *Allgeyer* and the *St. Louis Compress* cases were decided respectively in 1896 and 1922. Since then, the authority of those cases have been questioned in subsequent opinions by the United States Supreme Court." (Application, p. 15)

The authority of *St. Louis Compress*, as well as *Connecticut General Life Insurance Company*, was very recently recognized by the Supreme Court in *Federal Trade Commission v. Travelers Health Association*, 362 U.S. 301, decided March 28, 1960, citing the following 1945 congressional report on the McCarran-Ferguson Act:

"It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business or insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should pro-[fol. 292] vide for the continued regulation and taxation of insurance by the states, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co. v. Arkansas* (260 U.S. 346) and *Connecticut General Life Insurance Co. v. Johnson* (303 U.S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to

*regulate such transactions in any way.*" (H.R. Rep. No. 143, 79th Congress, 1st Sess. 3).

Petitioners' suggestion that the Supreme Court has "Questioned" and the Court of Civil Appeals' observation that the Court had "Criticized" *St. Louis Compress* are not clear nor explained, but it is clear that the Supreme Court has not "questioned" its authority in a tax case nor criticized the soundness of condemning a tax on premium payments in another state.

In the cases that have distinguished *St. Louis Compress*, such as the *Osborn* (310 U.S. 53) and *Hoopston* (318 U.S. 313) cases, *St. Louis Compress* has been distinguished on the ground that the regulated insurance company *had a permit to do business in the state* and the activities regulated were not extraterritorial. The valid distinction between *regulation within the state* and *taxation without the state* in no way lessens the force of *St. Louis Compress* when applied to Respondent's premium payments outside Texas. "Neither the *Cotton Compress* case nor the *Allamer* case has been overruled", (C.C.A. Opinion, P. 9) and, [fol. 293] consequently, the invalidity of Article 2138 (2) (c) is well settled.

(7)

### The Unadmitted Insurance Tax Is an Occupation Tax and Not a Regulation.

Although the Court of Civil Appeals opinion properly ignores Petitioners' regulation argument, Petitioners tediously argue that the unadmitted insurance tax is a "Regulation" rather than a Tax. Yet, the constitutional effect of the "tax" cannot be changed by its name or characterization (tax or regulation). This is made crystal clear in *St. Louis Compress*, 260 U.S. 346, 348:

"The supreme court justified the imposition as an occupation tax,—that is, as we understand it, a tax upon the occupation of the defendant. But this court although bound by the construction that the supreme court may put upon the statute, is not bound by the

characterization of it, so far as that characterization may bear upon the question of its constitutional effect. *St. Louis Southwestern R. Co. v. Arkansas*, 235 U.S. 350, 362, 59 L. ed. 265, 271, 35 Sup. Ct. Rep. 99. The short question is whether this so-called tax is saved because of the name given to it by the statute, when it has been decided in *Allgeyer v. Louisiana*, 165 U.S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427, that the imposition of a round sum, called a fine, for doing the same thing, called an offense, is invalid under the 14th Amendment. It is argued that there is a distinction because the Louisiana statute prohibits (by implication) what this statute permits. But that distinction, apart from some relatively insignificant collateral consequences, is merely in the amount of the detriment imposed upon doing the act. The name given by the statute to the imposition is not conclusive. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 66 L. ed. 817, 21 A.L.R. 1432, 42 Sup. Ct. Rep. 449; *Lipke v. Lederer*, 259 U.S. 557, 66 L. ed. 1061, 42 Sup. Ct. Rep. 549. In Louisiana the detriment was \$1,000. [fol. 294] Here it is 5 per cent upon the premiums,—which is 3 per cent more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the state. This case is stronger than that of *Allgeyer* in that here no act was done within the state, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside."

However, Petitioners' contention that the "tax" is a "regulation" is utterly devoid of merit.

Shortly after the enactment of the *unadmitted insurance* tax in 1957 the State Board of Insurance and the Comptroller of Public Accounts for the State of Texas administratively determined that the *unadmitted insurance* tax is an

"Occupation Tax" (See Court of Civil Appeals Opinion, p. 6, State Board of Insurance Annual Reports for 1957, 1958 and 1959, S.F. p. 8, Plaintiff's Exhibit 4, S.F. p. 10, Plaintiff's Exhibit 5, S.F. p. 11, Plaintiff's Exhibit 6, S.F. pp. 11 and 12; S.F. p. 19-24) (See also the Factual Stipulation, Plaintiff's Exhibit 1, S.F. p. 2)

The State Board of Insurance and the Comptroller of Public Accounts have set aside one fourth of the unadmitted insurance tax to the public free school fund as required of all occupation taxes by Article 7, Section 3, of the Constitution of the State of Texas. This was done because the State Board of Insurance and the Comptroller classified the unadmitted insurance tax as an occupation [fol. 295] tax (S.F. p. 26).

Although, at the time of the trial, Petitioners argued that the unadmitted insurance tax was a regulation and not an occupation tax, the State Board of Insurance and the Comptroller were continuing to construe and disburse such tax as an occupation tax in the same manner as they had done from the date of its enactment. In light of this long and consistent administrative interpretation, the Petitioners' current argument that the unadmitted insurance tax is not really an occupation tax cannot be taken seriously.

Moreover, at the time of the enactment of the tax in 1957, the Legislature expressly declared its purpose in Sec. 7 of Chapter 395 of the Laws of the 55th Regular Session of the 55th Legislature as follows:

"Sec. 7. The fact that the present laws relating to the placement of surplus lines of insurance do not provide adequately *for the conditions under which it shall be placed* with unauthorized insurers in a manner which *will insure the collection of the tax levied* upon the premiums charged or paid for such insurance creates an emergency and an imperative public necessity. . . ."

In light of this openly avowed declaration of intention to collect and insure collection of the tax on premiums paid to "unauthorized insurers", i.e., the collecting of the tax theretofore levied in Article 21.38(d) and thereupon levied in Article 21.38(e), Petitioners' argument of a different

intention is without force. In other words, the 1957 amendment simply eliminated the only possibility—paying premiums directly to “unauthorized insurers” for avoiding the discriminatory five per cent (5%) tax imposed by Article 21.38(d) in 1951.

The Legislative purpose—to tax and to collect the tax, as a revenue measure—was carried into effect by the departmental construction of the Comptroller and the State Board of Insurance. The Comptroller and the Board have construed the tax as an occupation tax and one-fourth of the tax, therefore, has been set aside for the benefit of the public free schools (available fund) in accordance with the Texas Constitution, Article 7, Section 3.

Any attempt by the State to renounce the Legislature’s avowed tax purpose is plainly without merit and an untimely afterthought induced by this case.

Petitioners’ pretension that the tax is designed to regulate insurance companies is refuted by Petitioners’ stipulation that neither of the London insurers was regulated or subject to regulation in Texas. (C.C.A. Opinion, p. 2)

Petitioners’ argument that the tax was designed to protect Respondent from its own credulity in buying from “unadmitted insurers” is thoroughly squelched by the testimony of the Texas Commissioner of Insurance (S.F. p. 19):

Q. “Do you do anything to try to regulate where or from whom Todd Shipyards buys its insurance?”

A. “No, sir.”

[fol. 297] The distinction between regulations and taxes was presented in the *Roue* case, 151 Tex. 182, 247 S.W. 2d 231, wherein the controlling principles, although carefully couched in generalities, are set forth:

“The leading case in Texas is *Texas Co. v. Stephens*, 1907, 100 Tex. 628, 103 S.W. 481 by Justice Williams. This court, in very clear and compelling language, laid down the rule for determining the distinction in the case of *Hurt v. Cooper*, 130 Tex. 433, 110 S.W. 2d 896,

899, (1) as follows: "It is sometimes difficult to determine whether a given statute should be classed as a regulatory measure. The principle of distinction generally recognized is that when, from a consideration of the statute as a whole, *the primary purpose of the fees provided therein is the raising of revenue, then such fees are in fact occupation taxes, and this regardless of the name by which they are designated.* On the other hand, if its primary purpose appears to be that of regulation, then the fees levied are license fees and not taxes." (Emphasis added)

Under these principles of the *Stephens, Cooper and Row* cases, the unadmitted insurance tax is clearly an occupation tax as originally announced by the Legislature and as originally construed by the State Comptroller and the State Board of Insurance.

#### (4)

#### *Osborn v. Ozlin and Hoopston Canning Company* Do Not Support Petitioners' Position.

Petitioners' reliance on *Osborn v. Ozlin*, 310 U.S. 53, and similar cases, is not justified. In *Osborn v. Ozlin*, the Virginia statute provided that no insurance on property within Virginia should be issued by a company *authorized to do business in Virginia* unless countersigned by a resident agent who was forbidden to share more than 50% of his [fol. 298] commission with non-resident brokers, and the Court held that since (1) the statute was applicable only to insurance companies authorized to do business in Virginia, and (2) the statute was not aimed at taxing or prohibiting contracts beyond Virginia's borders, the insurance company was not denied due process, because Virginia had jurisdiction to regulate the activities of a licensed insurer within the State. *Osborn v. Ozlin* specifically distinguishes *St. Louis Compress Co.*, the *Tabacos* and *Allgeyer* cases on the basis that the statutes in *Allgeyer*, *St. Louis Compress* and *Tabacos* (1) were not directed at the regulation of insurance within the state, but to the making of contracts



outside the state, and (2) *St. Louis Compress* did not tax nor regulate an insurer having a permit in the taxing jurisdiction.

Since (1) the unadmitted insurance tax is identical to the *Arkansas* tax condemned in *St. Louis Compress*, and (2) *Osborn v. Ozlin* expressly distinguishes *St. Louis Compress*, the *Osborn* case is no authority upholding the State's jurisdiction to tax Respondents' premium payments in New York.

Moreover, *Osborn v. Ozlin* does not uphold any tax and makes no comment on the State's power to tax premium payments in another state.

Another case relied on by the State is *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, that upheld New York's right to regulate an insurance company licensed and doing business in New York. The *Allgeyer* and *St. Louis Compress* [fol. 299] rule is distinguished in *Hoopeston Canning Co.*, and therefore, the *Hoopeston* case is no authority supporting the State's power to tax Respondent.

Again *Hoopeston* makes no holding nor comment on the State's power to tax premium payments in another state.

### (5)

*St. Louis Compress Co. Establishes a Sound Public Policy.*

Although the policy of the United States is settled by *St. Louis Cotton Compress*, its policy of preventing a State from favoring its own and preventing the state from taxing transactions in another state is sound.

The Respondent's premium payments have been subjected to a three per cent (3%) tax levied by New York State, the situs of the premium payments. Article 6, Sec. 122, Subsection 9, Chapter 28, Insurance Laws, of the Consolidated Laws of the State of New York, levies a three per cent (3%) tax on these premiums.

If the states of New York and Texas are each permitted to tax the same premium payments, there will inevitably result, not only double, if not multiple, taxation among the states, but an unseemly race among the states to gain new tax sources by contriving to tax payments and other transactions clearly outside the constitutional border of the tax-

ing jurisdiction. The Due Process Clause of the Fourteenth Amendment was intended to confine the State's taxing [fol. 300] power to transactions within the State.

If Texas is allowed to tax New York premium payments, the State's taxing power will be released to roam unconfined and vagrant on property, transactions, occupations and business done in other states. This will not do, if "due process" and the Federal system are to survive. See Concurring Opinion of Justice Brennan in *Allied Stores v. Bowers*, 358 U.S. 522.

Appellants are not justified in relying on cases permitting the state to regulate the use of automobiles within the state, *Gillaspie v. Department of Public Safety*, 152 Tex. 459, 259 S.W. 2d 177, Cert. Den., 347 U.S. 433, to tax chain stores within the state, *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412, and to permit a direct action against an insurance company in the state courts, *Watson v. Employers' Liability Assurance Corp.*, 348 U.S. 66. In each of these cases the states regulated or taxed property, transactions or proceedings within the state, while Petitioners are attempting to tax Appellee's activities in New York—to wit, the New York payment of premiums.

Justice Holmes declared a wholesome public policy in *St. Louis Compress Co. v. State of Arkansas*, 260 U.S. 346, that denies Texas the power to tax Respondent's New York insurance premium payments:

"It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside. . . ."

[fol. 301] The wisdom of Justice Holmes' policy determination is beyond question, and it may not be lightly cast aside.

Respondent agrees with Petitioners that the due process clauses of the Texas and United States Constitutions are coextensive in their limitation on the state's power to tax. (Application, p. 3)

Respondent respectfully submits that the lower Courts correctly held the unadmitted insurance tax unconstitutional and void under the due process clauses of the Texas and United States Constitutions, because:

- (1) The unconstitutionality of the unadmitted insurance tax under the due process clause is not an open question and is settled against Appellants' contention by *St. Louis Compress Company v. State of Arkansas*, 260 U.S. 346, and like cases.
- (2) Holmes' declaration that "the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside" is sound policy.
- (3) The authorities relied on by Appellants, *Osborn v. Ozlin*, 310 U.S. 53, and *Hoopeson v. Cullen*, 318 U.S. 313, are not tax cases and are not even remotely in point.

### Counterpoint No. 2

The Texas Unadmitted Insurance Tax Levied on Insurance Premiums Paid by Appellee in New York to Unadmitted Insurers Is Unconstitutional and Void Under the [fol. 302] Equality and Uniformity Clauses of the Texas Constitution. Because (1) the Unadmitted Insurance Tax Is an Arbitrary, Unreasonable and Invidious Discrimination Against Foreign Insurers and in Favor of Domestic Insurers, and (2) All Persons Paying Insurance Premiums on Policies Covering Texas Risks Are Not Taxed Equally and Uniformly, and Therefore, the Tax Denies Equality and Uniformity as Guaranteed by the Texas Constitution, Article 8, Sections 1 and 2.

### Argument Under Counterpoint No. 2

The Court of Civil Appeals did not discuss nor decide the Texas "Equality" point, although it stated the point was presented for review.

#### (1)

"Constitutional Equality" Condemns the Attempt to Exempt Domestic Insurers From the Tax.

Article 8, Section 2 of the Texas Constitution specifically provides for "equality" in "occupation taxes":

"All occupation taxes shall be equal and uniform upon the same *class of subjects* within the limits of the authority levying the tax; . . ." (Emphasis added)

Article 8, Section 1 provides for "equality" in all taxation:

"Taxation shall be equal and uniform . . ."

As stipulated by the State, the 5% tax is levied *on the gross premiums paid on policies covering Texas risks* by an assured to an "unauthorized insurer", while premiums paid on identical policies to "authorized insurers" are taxed at a much smaller and discriminatory rate,—i.e., 1.1% to 3.85% (see Stipulation of Facts, Plaintiff's Exhibit No. 1, S.F. p. 2; C.C.A., opinion p. 6).

[fol. 303] The "*taxable incident*" is the premium payment, and the tax is measured by the amount of the payment.

The subject of the tax is "payment of premiums on insurance policies covering Texas risks".

Under the Equality and Uniformity Clause of the Texas Constitution the issues are simply:

- (1) Does the Levy of a Tax on Only a Carved Out Portion of the Premiums Paid on Texas Risks Violate the Texas "Equality" Requirement?
- (2) Does the Discrimination in Favor of Persons Paying Premiums to Texas or Admitted Insurers and Against Persons Paying Premiums to Foreign or Unadmitted Insurers Violate the Texas Constitution's Equality and Uniformity Provision?

As early as 1885, in *Pullman Palace Car Company v. The State of Texas*, 64 Tex. 274, the State attempted an occupation tax upon dining and pullman cars, but exempted cars owned and operated by a railroad on its own tracks. The Texas Supreme Court held that since the *subject of the tax was operating dining and pullman cars, all persons operating such cars must be equally and uniformly taxed*, and the exemption of railroad owned and operated cars rendered the tax unequal, unconstitutional and void under Article 8, Section 2.

The Court stated:

"The Legislature may classify subjects of taxation, and these classifications may be more or less arbitrary; but *when the classification is made all must be subjected to the payment of the tax imposed*, who, by the existence of the facts on which the classification is based, *fall within it*, unless exempted under some other constitutional provision."

[fol. 304] The *subject taxed* by the unadmitted insurance tax is *payment of premiums on policies covering Texas risks*, and the five per cent (5%) rate levied against Respondent by reason of such payments is not equal to a tax at rates between 1.1% and 3.85% on identical premium payments to Texas insurers. The Legislature may not lawfully impose discriminatory rates on the same tax subject—premiums paid on policies covering Texas risks—by exempting domestic insurers from the five per cent (5%) tax.

The lesson of the *Pullman* case is that the Legislature may select subjects of taxation, such as "*premiums paid on Texas risks*", but after selecting the subject of the tax,—i.e., gross premiums paid on Texas risks—the Legislature must tax all premiums equally without exemption and without discriminating against payments to foreign or unadmitted insurers and without favoring domestic or admitted insurers.

In other words, the payment of premiums on Texas risks may be selected as the "taxable event", but the Legislature may not then further select only certain persons performing the "taxable event".

Since premiums paid to Texas insurers are taxed at a much lower rate, 1.1% to 3.85% than premiums paid to foreign insurers, the tax is void and constitutionally unequal.

The principle was reaffirmed in *Hoeftling v. The City of San Antonio*, 85 Tex. 228, 20 S.W. 85, holding a city tax levied on butchers occupying private stalls could not exempt [fol. 305] butchers renting stalls from the City of San Antonio. In the *Hoeftling* case the *subject of taxation* was "butchers occupying stalls", and the court held no category of "butchers occupying stalls", including butchers renting

stalls from the City, could lawfully be exempted from the class. The *Hedding* classification is indistinguishable from the admitted-unadmitted insurer classification, since the subject of the tax is "*gross premiums paid on Texas risks*", and, therefore, the Legislature could not lawfully exempt admitted insurers from the taxable class, i.e., persons paying premiums on Texas risks.

(2)

**Equality and Uniformity Condemn the Effort to Carve Out a Class of Taxpayers Paying Premiums on Texas Risks.**

In *H. Roue Co. v. Texas Citrus Commission*, 151 Tex. 182, 247 S.W. 2d 231, a tax was levied on all persons packing, processing, placing, selling, etc. citrus fruit grown in Texas, but exempting all natural persons. Held, the exemption of natural persons was an unconstitutional discrimination against corporations and was prohibited by the Texas "equality" requirement.

*Roue* illustrates an unconstitutional exemption of certain persons (natural persons) performing the "taxable event" (packing, etc. citrus fruit grown in Texas). This is the same type of unconstitutional discrimination incorporated in the unadmitted insurance tax—i.e., the exemption of certain persons (paying to admitted insurers) performing the taxable event (paying premiums on Texas risks). [fol. 306] Moreover, the *Roue* case condemns a classification in favor of natural persons and discriminating against corporations. The Article 21.38(2)(c) classification in favor of persons paying premiums to admitted insurers and against persons paying premiums to unadmitted insurers is an equally arbitrary and invidious violation of the equality and uniformity requirement of Article 8, Sections 1 and 2 of the Texas Constitution.

However, in the application of the *Roue* case to Article 21.38(2)(c), Respondent and Petitioners divide on the basic question:

"What Is the 'Subject of the Tax' or the 'Taxable Event'?"

Respondent submits that the "taxable event" and "subject of the tax" is the payment of premiums on Texas risks.

On the other hand, Petitioners argue that the taxable event is the "payment of premiums on Texas risks to *unadmitted insurers*". This is demonstrated by Petitioners' argument in the Court of Civil Appeals. (Appellants' Brief, p. 25):

"Appellee depended upon *Rouze v. Texas Citrus Commission*, 151 Tex. 182, 247 S.W. 2d 231, in the trial court. That case involved this second question: *within the class are all members taxed equally?* There the Legislature levied a tax upon persons, firms, associations, and corporations growing citrus fruit. The *exemption* to the tax was provided to 'natural persons growing citrus fruit'. Clearly, then, all members of the class were not taxed equally. The case before this Court is clearly distinguishable from the *Rouze* case since Subsection (e) of Section 2 of Article 21.38 is [fol. 307] applicable to *all* persons who purchase from authorized insurers.'" (Emphasis added)

Petitioners suggest that the *Rouze* tax is condemned because of the express exemption of "natural persons" from the tax on "all persons" growing fruit. This is true!

Yet, if the *Rouze* tax had been levied only against corporations without exempting natural persons, the constitutional effect, i.e., the discrimination against corporations is the same. The objectionable classification is the same whether the exemption is made expressly or is accomplished in defining the persons against whom the tax is levied.

The constitutional vice is in exempting persons after selecting the "subject of the tax"—i.e., persons growing . . . citrus fruit". If the tax is levied on all persons growing citrus fruit, no class of persons growing the taxed fruit may be lawfully exempted or carved from the statute imposing the tax. Likewise, if the tax is levied on premium payments on policies covering Texas risks, no class of persons may be exempted or carved from the statute imposing the tax. Respondent's payments to unadmitted insurers are entitled to equal treatment and may not be lawfully carved from the larger class paying premiums on Texas risks.



While the exemption of admitted insurers in Article 21.38(2)(c) is more subtle than the express exemption in the *Rouss* case, because the exemption is accomplished in [fol. 308] defining the persons subject to the tax, the deliberate discrimination against unadmitted insurers is nonetheless real and unconstitutional.

The unadmitted insurance tax might have been drafted so as to place the tax on all persons "paying premiums on Texas risks" with an exemption for those paying to admitted insurers. Appellants apparently concede this is an unconstitutional exemption, even though the unadmitted insurance tax accomplishes this precise exemption in defining the persons subject to the tax.

For example, the unadmitted insurance tax effectively exempts from the tax persons paying to admitted insurers. The vice is the same as in the *Rouss* case,—certain persons performing the taxable event (paying premiums on Texas risks) are exempt. The vice cannot be eliminated by the method employed to accomplish this exemption. The constitutional effect is the same, and whether the exemption is stated to be an exemption as in the *Rouss* case or the exemption is accomplished by defining the "taxable event" as in the unadmitted insurance tax is immaterial. In other words, whenever the unlawful exemption is accomplished the tax is not equal.

Petitioners' presentation of "Equality and Uniformity" never meets two vital issues, to-wit:

- (1) May the Legislature lawfully exempt certain persons (those paying to admitted insurers) performing the taxable event (paying premiums on Texas risks)?
- (2) In any event, may the State lawfully discriminate against unadmitted or foreign insurers in favor of domestic or admitted insurers, i.e.,—is a classification based on "admission to do business in the state" [fol. 309] unconstitutionally arbitrary and unreasonable?

Respondent submits that the unadmitted insurance tax is an unconstitutional violation of the "Equality and Uniformity" clauses of the Texas Constitution, because

- (1) Upon proper analysis, the "subject of the tax" or "taxable event" is payment of insurance premiums on Texas risks.
- (2) This attempt to favor admitted insurers and to discriminate against unadmitted insurers creates an arbitrary and unreasonable classification destroying the equality and uniformity required by the Texas Constitution.
- (3) Although the Legislature may establish classifications for taxes such as premium payments on Texas risks, pullman cars, butcher's stalls or packing citrus fruit, when the Legislature decided to tax premium payments on Texas risks, it could not lawfully exempt payments to admitted insurers.

### Counterpoint No. 3

The Texas Unadmitted Insurance Tax Levied on Insurance Premiums Paid by Respondent in New York to Unadmitted Insurers Is Unconstitutional and Void Under the Equal Protection Clause of the United States Constitution's Fourteenth Amendment, Because (1) the Unadmitted Insurance Tax Is an Arbitrary and Unreasonable Discrimination Against Unadmitted Insurers in Favor of Admitted Insurers, and (2) All Persons Paying Insurance Premiums on Policies Covering Texas Risks Are Not Taxed Equally, and Therefore, the Tax Denies Equal Protection of the Laws as Guaranteed by the United States Constitution's Fourteenth Amendment and Is Invalid and Void.

### Argument Under Counterpoint No. 3

[fol. 310] The Court of Civil Appeals did not reach nor decide whether equal protection condemned Article 21.38 (2)(e).

## (1)

**"Equal Protection" Condemns the State's Attempt to Favor Domestic Insurers and Discriminate Against Foreign Insurers.**

The deliberate discrimination embodied in the unadmitted insurance tax is a discrimination in favor of premiums paid to admitted insurers (1.1% to 3.85% rate) and against premiums paid to unadmitted insurers (5% rate). (See Stipulation, Plaintiff's Exhibit No. 1, S.F., p. 2; C.C.A. Opinion, p. 6). The Legislature openly seeks to favor admitted insurers by this discriminatory tax on premium payments to unadmitted insurers.

The Equal Protection Clause of the Fourteenth Amendment imposes restrictions substantially similar to the Equality and Uniformity Clauses of Article 8, Sections 1 and 2 of the Texas Constitution. (See 51 Am. Jur. 222)

The unconstitutionality of a discrimination favoring domestic over foreign insurers has been well established since *Hanover Fire Insurance Company v. Carr*, 272 U.S. 494, invalidating under the equal protection clause, an Illinois net receipts tax levied on foreign corporations but exempting domestic corporations. The Court wrote at page 516:

"But an occupation tax imposed upon 100 per cent of the net receipts of foreign insurance companies admitted to do business in Illinois is a *heavy discrimination in favor of domestic insurance companies of [fol. 311] the same class and in the same business* which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent of the full value of the property. It is a denial of the equal protection of the laws." (Emphasis added)

*Hanover Fire Insurance Company* teaches that "Equal Protection" prevents the state from imposing taxes that favor domestic insurers and discriminates against foreign insurers.

Recently, *Fireman's Fund Insurance Company v. McDaniel*, 327 S.W. 2d 358 (No Writ) squarely condemned a discrimination in the Texas venue statute against foreign corporations and in favor of domestic corporations, because a domestic-foreign corporation classification is arbitrary and unreasonable resulting in constitutionally unequal treatment. This domestic-foreign corporation classification is the same discriminatory classification presented in the case at bar.

The United States Supreme Court has uniformly condemned as constitutionally "unequal" all attempts by the States to favor transactions with *residents* and to discriminate against transactions with *non residents*. The leading case is *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, cited and followed in *Roux*, 151 Tex. 182, 247 S.W. 2d 231, holding a tax on intangibles of a foreign corporation, although exempting identical intangibles of residents, is an unconstitutional classification. *Glander* plainly declares that state taxation may not establish classifications to *favor residents* and to *discriminate against non-residents*. The Court said:

[fol.312] "It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but *solely because of the different residence of the owner.*"

Respondent is not accorded equal treatment and the inequality is not because of the slightest different (sic) in Texas' relation to the premium payment, but the inequality is solely because of paying premiums to unadmitted insurers. The inequality deliberately favors Texas insurers and deliberately discriminates against New York and London insurers.

*Glander* teaches that (1) a state tax must equally apply to its residents and a foreign corporation, and (2) "Equal Protection" denies the states the right to favor their residents over non-residents. The Texas unadmitted insurance tax does not apply equally to admitted (residents) and unadmitted insurers (non-residents) and falls within the specific condemnation of *Glander*.

A recent case, *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, upheld an Ohio tax favoring property of non-residents and discriminating against property of residents. Yet, the concurring opinion of Justice Brennan carefully preserves *Glander's* authority and Justice Brennan declared that any State attempt to favor residents is condemned by the Fourteenth Amendment and is judged mechanically, i.e., discrimination in favor of residents is unlawful per se, because of the nature of our Federal system. Justice Brennan wrote:

[fol.313] "... There is, therefore, no reason to judge the state action mechanically by the same principles as state efforts to favor resident. . . ."

The Texas unadmitted insurance tax may be condemned "mechanically" because it is a clear effort to favor residents and "those paying tribute to the state".

Although the United States Supreme Court has approved many different schemes of classification and has approved a classification favoring non-residents over residents, *Allied Store of Ohio v. Bowers*, 358 U.S. 522, the United States Supreme Court has uniformly condemned all attempts by states to levy taxes discriminating in favor of domestic corporations and discriminating against foreign corporations.

The point Respondent makes is that equal protection prevents Texas from selecting a class for taxation so as to favor domestic insurers and to discriminate against foreign insurers. To state the point in yet another way, a classification of admitted and unadmitted insurers so as to favor the admitted insurers is an arbitrary and unconstitutionally unequal classification.

Petitioners' brief does not cite any United States Supreme Court authority on "Equal Protection" approving or disapproving of a state's attempt to favor its own residents or domestic insurers. Moreover, Petitioners erroneously assume any classification satisfies equal protection, and, therefore, Petitioners do not attempt to distinguish between valid and invalid classifications.

[fol.314] It is true that the unadmitted insurance tax accomplishes its intended discrimination by distinguish-

ing between admitted and unadmitted insurers and does not expressly base the discrimination on residence and non-residence or on domestic and foreign insurers. However, Respondent submits that there is no distinction between the unadmitted insurance tax's classification of "admitted and unadmitted insurers" and the classification of domestic and foreign insurers in *Hanover Fire Insurance Co.* The State's effort to favor admitted insurers and discriminate against unadmitted insurers is identical to and has the same vices as the State's efforts to favor domestic over foreign insurers. Each of these discriminations permits the State to favor its own, flies in the face of our Federal system and defies the limitations of "Equal Protection".

Petitioners do not distinguish but simply ignore *Hanover Fire Insurance Co.*, condemning a classification favoring domestic insurers and discriminating against foreign insurers. Respondent's attack is leveled at a classification adopted in the unadmitted insurance tax so as to favor domestic or admitted insurers and to discriminate against foreign or unadmitted insurers. Substantially similar attacks were sustained in the *Hanover Fire*, *Fireman's Fund* and *Glander* cases.

Respondent submits that the following classifications are unequal:

[fol. 315] (1) Domestic-Foreign Corporation classification favoring domestic corporation (*Hanover Fire*, *Glander*, *Fireman's Fund Insurance Company*—case at bar)

(2) Admitted-Unadmitted Insurance Company classification favoring admitted insurers, which is merely another way of saying domestic insurers-foreign insurers favoring domestic insurers.

(2)

The Exemption of Domestic Insurers From  
the Tax Denies Equal Protection.

Respondent's equality and uniformity argument under Counterpoint No. 2 pointing out that no class of persons

performing the "taxable event"—paying premiums on Texas risks—may be exempted from the tax is equally valid under the "Equal Protection" point. This "no-exemption" principle was followed in *Morey v. Doud*, 354 U.S. 457, when an Illinois license and regulatory statute applying to firms "selling or issuing money orders"—but exempting the American Express Company—was condemned as a denial of "Equal Protection".

In other words, after Illinois decided to regulate the "selling and issuing of money orders" all people so selling and issuing are required by "Equal Protection" to be treated equally.

The *Morey* principle requires that all persons "paying premiums on Texas risks" be taxed equally and condemns the attempted Texas exemption in favor of domestic insurers.

[fol. 316]

#### Summary of Argument

In a nutshell, Petitioners' equality arguments under Counterpoints Nos. 2 and 3 are two-pronged:

- (a) First:—Although the State may classify taxable events (premium payments on Texas risks), the State may not classify the persons performing the taxable event ("persons paying to admitted or unadmitted insurers"). The attempted classification of persons renders the tax constitutionally unequal and void.
- (b) Second:—Even though the State has the right to classify persons paying the taxed premiums, nevertheless, the attempted discriminatory classification in favor of payments to domestic (admitted insurers) and against foreign insurers (unadmitted insurers) is arbitrary and unreasonable so as to render the tax constitutionally unequal and void.

The distinction between the First and Second analysis is not always clearly drawn in the cases, yet Respondent submits that two "equality" questions are presented:



- (1) The power to classify persons paying premiums on Texas risks, vel non, and
- (2) The reasonableness of the classification—admitted and unadmitted insurers.

Respondent strongly urges that the unadmitted insurance tax is unconstitutional and void, because:

- (1) When applied to Appellee's premium payments in New York, the unadmitted insurance tax is condemned by the due process clauses of the Texas and United States Constitutions by the authority of *St. Louis Compress Company v. Arkansas*, 260 U.S. 346.
- [fol. 317] (2) The subject of the unadmitted insurance tax is premiums paid on Texas risks, but exempting admitted insurers who are taxed at a favored rate. The exemption of "admitted insurers" is unreasonable and is condemned by the equality requirements of the Texas and United States Constitutions.
- (3) The discrimination in favor of premiums paid to "resident or admitted insurers" (1.1% to 3.85%) and the discrimination against "unadmitted or foreign insurers" (5% tax rate) is an arbitrary and unreasonable classification condemned by the Equality requirements of the Texas and United States Constitutions.

Wherefore, Premises Considered, Respondent prays that (1) the Application for Writ of Error be refused or alternatively, refused N.R.E., (2) the unadmitted insurance tax be held unconstitutional and void when applied to Respondent's New York premium payments, and (3) for such other and further relief and orders as may be appropriate in the premises.

Liddell, Austin, Dawson & Huggins, By Charles R. Vickery, Jr., Attorneys for Appellee, Todd Shipyards Corporation, 519 Gulf Building, Houston 2, Texas.

[fol. 318] Certificate of service (omitted in printing).

[fol. 319] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 320]

---

IN THE SUPREME COURT OF TEXAS

AUSTIN

No. A-8150

From Travis County, Third District

---

STATE BOARD OF INSURANCE ET AL.

vs.

TODD SHIPYARDS CORPORATION

---

JUDGMENT—February 8, 1961

Application of petitioners for writ of error to the Court of Civil Appeals for the Third Supreme Judicial District having been duly considered by the Court, and the Court having determined that same presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that the application be, and hereby is, refused in accordance with the per curiam opinion herein this day delivered.

It is further ordered that petitioners, the State Board of Insurance of Texas and its individual members, William A. Harrison, Commissioner of Insurance, Will Wilson, Attorney General of Texas, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas and Jesse James, Treasurer of the State of Texas, in their official capacities, pay all costs incurred on this application.

[fol. 321]

## IN THE SUPREME COURT OF TEXAS

No. A-8150

From Travis County, Third District

STATE BOARD OF INSURANCE, ET AL., Petitioner

v.

TODD SHIPYARDS CORPORATION, Respondent.

## PER CURIAM OPINION—February 8, 1961

We are of the opinion that the decision in this case is controlled by *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S. Ct. 427, 41 L. ed. 832 and *St. Louis Cotton Compress Company v. State of Arkansas*, 260 U.S. 346, 43 S. Ct. 125, 67 L. ed. 297. We are unwilling to take the position that in view of *Osborn v. Ozlin*, 310 U.S. 53, 60 S. Ct. 758, 84 L. ed. 1074 and *Hoopston Canning Co. v. Cullen*, 318 U.S. 313, 63 S. Ct. 602, 87 L. ed. 777, the Supreme Court of the United States will probably overrule the *Allgeyer* and *Cotton Compress* cases. We abide by what the Supreme Court has held and refuse to speculate upon what said Court may hold.

The application for writ of error to the Court of Civil Appeals (opinion reported in 340 S.W.2d 339) is refused, no reversible error.

[fol. 322] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 323]

[File endorsement omitted]

[fol. 324]

## IN THE SUPREME COURT OF TEXAS

No. A-8150

STATE OF TEXAS, ET AL., Petitioners

v.

TODD SHIPYARDS CORPORATION, Respondent

PETITIONERS' MOTION FOR REHEARING—

Filed February 20, 1961

To the Honorable Supreme Court of Texas:

Now Comes the State of Texas and the other petitioners in the above numbered and entitled cause, and respectfully move the Court to set aside the judgment of this Court, rendered on the 8th day of February, 1961, refusing the petitioners' application for writ of error, and to grant them a rehearing, and to grant petitioners' application for writ of error, and would respectfully say therefor:

The Supreme Court erred in refusing petitioners' application for writ of error on the first point which reads: The Court of Civil Appeals erred in holding that Article 21.38, Sec. 2, subsection (e), of the Texas Insurance Code is unconstitutional as a violation of due process, Section 1 of the 14th Amendment of the United States Constitution.

The Supreme Court erred in refusing petitioners' application for writ of error on the second point which reads: The Court of Civil Appeals erred in holding that Article 21.38, Sec. 2, subsection (e), of the Texas Insurance Code is unconstitutional as a violation of due process, Section [fol. 325] 19, Article I of the Texas Constitution.

The Supreme Court erred in refusing petitioners' application for writ of error on the third point which reads: The Court of Civil Appeals erred in failing to pass on

and in failing to hold that Article 21.38, Sec. 2, subsection (c) of the Texas Insurance Code is constitutional and not a violation of the equal protection clause of the United States Constitution, Section 1, 14th Amendment.

The Supreme Court erred in refusing petitioners' application for writ of error on the fourth point which reads: The Court of Civil Appeals erred in failing to pass on and in failing to hold that Article 21.38, Sec. 2, subsection (c) of the Texas Insurance Code is constitutional and not a violation of the equality and uniformity clauses of the Texas Constitution, Sections 1 and 2, Article VIII.

The Supreme Court erred in refusing petitioners' application for writ of error on the fifth point which reads: The Court of Civil Appeals erred in affirming the judgment of the trial court, and in not reversing and rendering the judgment of the trial court.

Wherefore, Premises Considered, the petitioners respectfully pray that this motion be granted and that petitioners' application for writ of error be granted.

Respectfully submitted,

Will Wilson, Attorney General of Texas; Fred B. Werkenthin, Assistant Attorney General; Bob E. Shannon, Assistant Attorney General, Attorneys for Petitioners, State of Texas, et al., Capitol Station, Austin 11, Texas.

[fol. 326] Certificate of Service (omitted in printing).

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 327]

IN THE SUPREME COURT OF TEXAS

No. A-8150

From Travis County, Third District

STATE BOARD OF INSURANCE ET AL.

VS.

TODD SHIPYARDS CORPORATION

ORDER OVERRULING MOTION FOR REHEARING—March 15, 1961

Petitioners' motion for rehearing of application for writ of error having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled.

[fol. 328]

SUPREME COURT OF THE UNITED STATES

No. 144—October Term, 1961

[Title omitted]

ORDER ALLOWING CERTIORARI—October 9, 1961

The petition herein for a writ of certiorari to the Court of Civil Appeals of the State of Texas, Third Supreme Judicial District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. [REDACTED] 144

IN THE  
**Supreme Court of the United States**  
TERM, 1961

STATE BOARD OF INSURANCE, ET AL,  
*Petitioners*

v.

TODD SHIPYARDS CORPORATION,  
*Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF CIVIL APPEALS OF TEXAS,  
THIRD SUPREME JUDICIAL DISTRICT,  
SITTING IN AUSTIN, TEXAS.

WILL WILSON,  
Attorney General of Texas

C. K. RICHARDS,  
Assistant Attorney General

FRED B. WERKENTHIN,  
Assistant Attorney General

BOB E. SHANNON,  
Assistant Attorney General

Counsel for Petitioners,  
State Board of Insurance, et al

Capitol Station  
Austin 11, Texas



## INDEX

	Page
Citations to Opinions Below	2
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	3
How the Federal Question is Presented	4
Reasons for Granting the Writ	5
Conclusion	14
Appendix "A"—Statute	A-1
"B"—Opinions and judgment below	B-1
"C"—Opinions and judgment below	C-1
"D"—Opinions and judgment below	D-1
"E"—State Taxation	E-1

## CITATIONS

### Cases:

Adair v. U. S., 208, U. S. 161 (1907)	6
Allgeyer v. Louisiana, 165 U. S. 528, (1896)	4, 5, 6, 7, 8, 13
California Automobile Association v. Maloney, 341 U.S. 105 (1950), appearing in 95 L.Ed. 805	7
Clay v. Sun Ins. Co., 363 U.S. 207, 220 (1959)	6
Coppage v. Kansas, 236 U.S. 1 (1914)	6
Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U.S. 143 (1933)	6
Hoopeston v. Cullen, 318 U.S. 313 (1942), 5, 6, 8, 10, 13	
Lincoln Union v. Northwestern Co., 335 U.S. 525 (1949)	6
Minnesota Assn. v. Benn, 261 U.S. 140 (1922)	6

# Citations (Continued)

	Page
Osborn v. Ozlin, 310 U.S. 53 (1940)	5, 6, 7, 8, 13
St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 347 (1922)	4, 5, 7
Travelers Health Association v. Virginia, 339 U. S. 643 (1950)	5, 6, 9, 13
Watson v. Employers Liability Corp., 348 U.S. 66 (1954)	6, 10
Statutes:	
McCarran Act, 15 U.S.C.A., §1011-1015	3
Texas Insurance Code, Vol. 14, Vernon's Annotated Civil Statutes	
Article 5.24	12
Article 5.49	12
Article 5.68	12
Article 21.38, Section 1	3
Article 21.38, Section 2(e)	cited throughout
Article 7064	12

No. \_\_\_\_\_

IN THE  
**Supreme Court of the United States**  
\_\_\_\_\_ TERM, 1961

---

STATE BOARD OF INSURANCE, ET AL,  
*Petitioners*

v.

TODD SHIPYARDS CORPORATION,  
*Respondent*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF CIVIL APPEALS OF TEXAS,  
THIRD SUPREME JUDICIAL DISTRICT,  
SITTING IN AUSTIN, TEXAS.**

---

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals of Texas for the Third Supreme Judicial District, entered in the above entitled case on November 16, 1960. Petitioner's application for writ of error to the Supreme Court of Texas was refused on February 8, 1961, and petitioner's motion for rehearing on application for writ of error was refused on March 15, 1961.

## **CITATIONS TO OPINIONS BELOW**

The opinion of the District Court is unreported and the judgment is printed in Appendix "B" hereto, pp. B-1—B-4. The opinion of the Court of Civil Appeals, printed in Appendix "C" hereto, pp. C-1—C-12, is reported in 340 S. W. 2d 339. The opinion of the Supreme Court of Texas in refusing to grant the petitioner's application for writ of error, printed in Appendix "D" hereto, p. D-1, is reported in 349 S. W. 2d 241.

## **JURISDICTION**

The judgment of the Court of Civil Appeals was entered on November 16, 1960, (Record). Rehearing was denied on November 23, 1960, (Record). The judgment of the Supreme Court of Texas refusing to grant the petitioner's application for writ of error was entered on February 8, 1961, (Record). Rehearing on petitioner's application for writ of error was refused on March 15, 1961, (Record). The jurisdiction of this Court is invoked under 28 U.S.C., §1257(3).

## **QUESTION PRESENTED**

Whether Texas is prohibited by the Due Process Clause of the Fourteenth Amendment of the United States Constitution from taxing insurance premiums paid by persons insuring Texas risks on insurance policies contracted for in New York.

## **STATUTE INVOLVED**

The statutory provision involved is Section 2(e) of Article 21.38 of the Texas Insurance Code, Vol.

14, Vernon's Annotated Civil Statutes. It is printed in Appendix "A", *infra*.

### STATEMENT

Article 21.38 of the Texas Insurance Code deals with the placing of insurance with unauthorized insurers. An "unauthorized insurer" is an insurance company not licensed to do business in Texas. Subsection (e) of Section 2 of that Act places a 5% tax on the gross premiums paid by any purchaser of insurance covering risks located within Texas from an unauthorized insurer. It is to be noted that the tax is placed upon the purchaser of insurance on risks located in Texas. Section 1 of Article 21.38 specifically states that its enactment is pursuant to the powers and privileges conferred upon the states by the McCarran Act, 15 U.S.C.A. §1011-1015.

The respondent is a New York corporation, with a certificate to do business in Texas, and for many years has owned and operated facilities at Galveston and Houston for ship repair and conversion. Approximately 27% of respondent's total volume of business is done in Texas, and it employs about 1500 people in Texas. To protect itself from risks arising out of the use of this Texas property, the respondent purchased several types of insurance from Lloyds of London and Institute of London Underwriters in New York City through certain brokers. Neither of these insurers have a permit to write insurance in Texas. Each of the policies upon which the tax was paid was contracted for, delivered, and paid for

in New York. All decisions related to the purchase of insurance and renewal of insurance, its coverage, the selection of insurers, and confirmation of insurance contracts were made in New York. All losses were payable in New York, and premiums were payable in New York. The facts of this case come within the terms of Article 21.38, Section 2(e), and the only issue raised is the constitutionality of the statute.

### **HOW THE FEDERAL QUESTION IS PRESENTED**

The respondent paid to the Comptroller of the State of Texas the tax levied by Section 2(e) of Article 21.38 of the Texas Insurance Code, under protest. Then the respondent filed suit in the 53rd District Court of Travis County, Texas, to recover the taxes paid, alleging in its petition that the tax was unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution (R.7). The trial court found that the tax was a violation of Due Process and found for the respondent. On appeal to the Court of Civil Appeals, Third Supreme Judicial District, the petitioner, by the first point of error in its brief, asserted that the trial court was in error when it found Section 2(e) unconstitutional as a violation of Due Process, Fourteenth Amendment of the United States Constitution. The Court of Civil Appeals sustained the holding of the trial court upon the authority of *Allgeyer v. Louisiana*, 165 U.S. 528 (1896), and *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 347 (1922). By applica-

tion for writ of error to the Supreme Court of Texas, the petitioner in its first point of error asserted that the trial court and the Court of Civil Appeals were in error in holding Section 2(e) of Article 21.38 unconstitutional as a violation of Due Process, Fourteenth Amendment of the United States Constitution. The Supreme Court refused the petitioner's application for writ of error, and its subsequent motion for rehearing, upon the authority of *Allgeyer v. Louisiana*, *supra*, and *St. Louis Cotton Compress Co. v. Arkansas*, *supra*.

## REASONS FOR GRANTING THE WRIT

### 1.

The decision of the court below which is decided upon the authority of *Allgeyer v. Louisiana*, and *St. Louis Cotton Compress Co. v. Arkansas*, is in conflict in principle with the more recent Supreme Court cases of *Osborn v. Ozlin*, 310 U.S. 53 (1940), *Hoopeston v. Cullen*, 318 U.S. 313, (1942), and *Travelers Health Association v. Virginia*, 339 U.S. 643 (1950).

The *Allgeyer* and the *St. Louis Cotton Compress* cases hold that a state may not tax or regulate insurance premiums on policies contracted for outside the taxing or regulating state, even though the property insured is located within the jurisdiction of the taxing or regulating state. It was said that this was an interference with the liberty of contract, and, as such, was a violation of Due Process.



The *Allgeyer* principle has been repudiated by the Supreme Court. In *Lincoln Union v. Northwestern Co.*, 335 U.S. 525 (1949), the court explicitly rejected *Adair v. U. S.*, 208 U.S. 161 (1907) and *Coppage v. Kansas*, 236 U.S. 1 (1914) (whose grand-sire is *Allgeyer*), by stating that since 1934 the United States Supreme Court had steadily been rejecting the Due Process philosophy enunciated by the *Adair-Coppage* line, and in doing so had returned closer to the earlier constitutional principle that states have power to legislate against what are to be found injurious practices in their internal commercial and business affairs. *Osborn v. Ozlin*, *supra*, *Hoopeston v. Cullen*, *supra*, and *Travelers Health Association v. Virginia*, *supra*, all expressly reject the *Allgeyer* principle and cases following its conceptualistic reasoning. Significantly, since *Osborn v. Ozlin*, each time the court has been confronted with direct precedent based upon the *Allgeyer* line it has overruled that precedent, or has in effect done so by the process of making distinctions. Thus, in *Travelers Health Association v. Virginia*, the court overruled *Minnesota Assn. v. Benn*, 261 U.S. 140 (1922); in *Watson v. Employers Liability Corp.*, 348 U.S. 66 (1954), the court in effect overruled *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1933).\*

The authority of *Allgeyer* has been questioned to such an extent that one writer has said, "Although the *Allgeyer* case has never been overruled, it is

---

\*See comments in dissenting opinion by Justice Black in *Clay v. Sun Ins. Co.*, 363 U.S. 207, 220 (1959).

doubtful whether the Supreme Court would reach the same result today even upon the precise fact situation involved." (Annotation to *California Automobile Association v. Maloney*, 341 U.S. 105 (1950), appearing in 95 L.Ed 805)

Significantly, the Court of Civil Appeals, below, though feeling constrained by the precedent in the *Allgeyer* and *St. Louis Compress* cases, to affirm the trial court's judgment, stated:

"We are confident that the Supreme Court of the United States, enlightened by its own criticism of the *Allgeyer* and *Cotton Compress* cases, will, upon proper application, re-examine those cases and pronounce a decision sustaining the Legislature of Texas in enacting this statute for the protection of its citizens in a field subject to rigid regulation by the state."

The approach now of the Court in determining the constitutionality of state regulatory matters as to Due Process is demonstrated by the following cases. That approach is not the conceptualistic one of *Allgeyer*, but rather it is an inquiry into the interest of the state in the insurance contract sought to be regulated.

*Osborn v. Ozlin*, 310 U.S. 53 (1940), holds that a state may require risks located within that state and insured against by an insurance company authorized to do business in that state to be purchased through registered insurance agents of that state. The court reasoned that Virginia had a definable interest in the insurance contracts sought to be reg-

ulated. By assuring that resident agents would be used to procure and service policies, Virginia was minimizing the risks of casualty and loss, thus benefiting the insurance company, the "producer" of insurance, the assured, and the community. The definable interest of Texas in the insurance contracts at bar is much clearer than in this case, and will be elaborated later in this petition. Like those in the *Osborn* case, the risks here insured against are located in Texas, and the persons upon whom the regulating measure is imposed are residents of Texas.

In *Hoopeston v. Cullen*, 318 U.S. 313 (1942), the Court upheld the validity of a New York regulation of reciprocal insurance associations even though the attorneys in fact were located in Illinois and the contracts of insurance were signed, and checks in payment of losses were mailed in Illinois. The issue in that case was whether the insurance enterprise so affected New York interests so as to give New York the power to regulate. In determining the power of the state to regulate insurance contracts, the Court rejected the conceptualistic approach, employed in *Allgeyer v. Louisiana*, of discussing the place of contracting or of performance of the contract. Instead, it recognized that a state may have substantial interests in the insurance of persons or property located within that state, and that interest may be measured by such realistic considerations as the protection of the citizen insured or the protection of the state from incidents of loss. The Court emphasized that the risks insured

against in this case were located within the regulating state.

In *Travelers Health Association v. Virginia*, 339 U.S. 643 (1950), the Virginia Corporate Commission ordered to mail-order insurance company located in Nebraska to cease from further offerings or sales of insurance to Virginia residents until it had complied with the Virginia "Blue Sky Law." The office from which it conducted a mail-order health insurance business was located in Nebraska. The policyholders mailed their assessments to Nebraska. The insurance company contended that since all of their activities took place in Nebraska, Virginia had no power to reach them in its cease and desist orders. The Court held that Virginia had a sufficient degree of interest in the insurance of its residents for its Corporate Commission to issue a cease and desist order. The Court said that the cease and desist provisions of the statute could "not be attacked merely because they affect business activities which are carried on outside the state." In this case, Virginia prohibited an insurance company from selling insurance to Virginia residents until it complied with Virginia's law. In the case at bar, Section 2(e) of Article 21.38 does not call for nearly so drastic a remedy—it does not prohibit, but simply levies a tax, and not upon an entity outside its borders, but upon persons admittedly within its jurisdiction who buy insurance from unauthorized insurers.

Some of the same issues are considered in the conflict of laws cases. It is long settled that a state may constitutionally refuse to enforce an insurance

contract or provision even though made in another state if its enforcement would be contrary to the policy of that state. In *Watson v. Employers Liability Corporation*, 348 U.S. 66 (1954), the applicability of the Louisiana direct action law to an insurance contract made in Massachusetts was involved. The plaintiff was injured in Louisiana while using a product of the insured. The insurance company contended that since the contract involved was a Massachusetts contract which forbade the plaintiff suing directly, the Louisiana direct action statute was an invalid attempt to regulate and control activities wholly beyond Louisiana boundaries. The Court held Louisiana had a valid interest in the Massachusetts contract and, as such, could apply its laws to it, and that it was immaterial that other states might also have an interest in the same transaction and might also regulate it.

To the petitioner, it is clear from these cases that the test of validity for state regulation is no longer a conceptualistic one, but rather the test is one of determining the degree of interest in the insurance contracts by the regulating state. It is then pertinent to briefly examine the interest of Texas in the insurance contracts in question.

It is at once apparent that this interest is substantial. Most important in these considerations is that the insured respondent is a Texas resident, and the property and risks insured are located in Texas. The various states have long exercised powers over property located within their respective jurisdictions. *Hoopeston v. Cullen, supra*. The in-

ability or failure of the unauthorized insurance company to pay for large casualty losses of the insured could cause catastrophic economic consequences in the Galveston and Houston area, with the ensuing burden upon state agencies to supply relief measures. The events which give rise to contractual obligation on the part of the insurance company to pay on policies will occur in Texas. Texas, or its instrumentalities, extend police protection to the insured property, and, especially in the case of losses by insured, the State will be called upon for police protection. In case of some of the insurance involved, persons compensated will be residents of Texas, and upon them will be placed the task of bringing suit in the event the unauthorized insurer denies the risk. These persons bringing suit will more than likely resort to Texas courts, and, unless they do, they will have to resort to distant forums at great trouble and expense.

Texas has a vital interest in the enforcement of laws regulating insurance on risks located in Texas. As noted by the Court of Civil Appeals, below, the insurance business has become rigidly regulated by the states to control the irresponsibility of the insurance business. As a part of this regulation, the states created insurance departments to supervise and inspect the financial condition of insurance companies doing business within the states, and to regulate policy forms and rates. This was done to protect the resident insureds from investing in contracts of insurance of companies which had not established their responsibility, financially or otherwise. However, many Texas residents were not

protected by the regulatory laws of the State since they were sold insurance on Texas risks from insurance companies not submitting to the regulatory supervision of the State. Such unauthorized companies in no way subjected themselves to the supervision and control of the State Board of Insurance. As long as this gap existed, the protection afforded by the State to its residents by its regulatory insurance program was limited.

The tax levied by Article 21.38, Section 2(e), was enacted to lessen in effect the number of insureds who were thus unprotected. If this measure is invalidated, many of the insurance companies now submitting to the supervision and control of the Texas Insurance Department will feel free to shake off the confining regulatory yoke and manage to insure Texas risks without submitting to Texas regulation by simply contracting insurance on Texas risks outside Texas.

As the regulation of insurance in Texas is designed to protect persons buying insurance on risks within Texas, it is proper that all of these risks share equally the cost of this regulation. The tax levied by Article 21.38, Section 2(e), was enacted to equalize the tax burden borne by Texas risks.\* Before the enactment of Section 2(e), authorized insurance companies paid the entire tax load for

---

\*Article 7064, Vernon's Annotated Civil Statutes, levies a 3.85% premium tax on all authorized insurance companies in addition to the various maintenance taxes: The Fire Insurance Maintenance Tax (Art. 5.49, Texas Insurance Code); The Casualty Insurance Maintenance Tax (Art. 5.24, Texas Insurance Code); and the Workmen's Compensation Insurance Comm. Tax (Art. 5.68, Texas



the regulatory supervision of the insurance industry in Texas as a consequence of insuring Texas risks, while the Texas risks insured against by unauthorized insurance companies escaped from paying any taxes. If Section 2(e) is invalidated, the authorized insurance companies will once again shoulder the entire burden of paying for the regulation of insurance in Texas. And again the temptation would be strong for authorized companies to abandon compliance with Texas law and begin underground insurance writing outside the State, as unauthorized insurers.

The petitioner submits that these interests of Texas in the insurance contracts involved here are every bit as substantial, or more substantial, than those involved in *Osborn v. Ozlin*, *Hoopeston v. Culien*, and *Travelers Health Association v. Virginia*, *supra*.

In conclusion, the petitioner submits that the Court of Civil Appeals, below, was in error in resolving this case by a Due Process philosophy, *Allgeyer v. Louisiana*, which has been deliberately discarded by the United States Supreme Court.

## 2.

The importance of the question presented to the administration of insurance regulation and taxa-

Insurance Code). [The above cited Articles appear in Volume 14, Vernon's Annotated Civil Statutes.] These taxes alone aggregate 5% or more of the gross premiums, the amount levied by Section 2(e), charged and do not take in account various agency fees and filing fees paid by authorized insurers.

tion by the State of Texas has already been indicated—many Texas risks are insured with unregulated companies; the dangers of presently authorized insurance companies leaving Texas; and the inequality of the tax burden on Texas risks insured with authorized companies. This question is of vital importance to approximately 22 other states which have laws similar to Section 2(e) of Article 21.38, and unless certiorari is granted, the validity of these laws will remain in question. (See Appendix “E”.)

### CONCLUSION

For the foregoing reasons, we submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILL WILSON,  
Attorney General of Texas

---

C. K. RICHARDS,  
Assistant Attorney General

---

FRED B. WERKENTHIN,  
Assistant Attorney General

---

BOB E. SHANNON,  
Assistant Attorney General  
Counsel for Petitioners,  
State Board of Insurance, et al  
Capitol Station  
Austin 11, Texas

**APPENDIX "A"**

**Article 21.38, Sec. 2(e)—Texas Insurance Code**

If any person, firm, association or corporation shall purchase from an insurer not licensed in the State of Texas a policy of insurance covering risks within this State in a manner other than through an insurance agent licensed as such under the laws of the State of Texas, such person, firm, association or corporation shall pay to the Board a tax of five per cent (5%) of the amount of the gross premiums paid by such insured for such insurance. Such tax shall be paid not later than thirty (30) days from the date on which such premium is paid to the unlicensed insurer.

**APPENDIX "B"**

**Judgment of the 53rd District Court in  
Todd Shipyards Corporation v. State Board of  
Insurance, et al, No. 112,081**

ON THIS the 2nd day of February, 1960, came on to be heard in regular order the above entitled and numbered cause, in which Todd Shipyards Corporation, a New York corporation, is Plaintiff and the State Board of Insurance, a body politic duly created and existing under and by virtue of the laws of the State of Texas, Penn J. Jackson, individually and as a member of the State Board of Insurance, Robert W. Strain, individually and as a member of the State Board of Insurance, J. P. Gibbs, individually and as a member of the State Board of Insurance, William A. Harrison, Commissioner of Insurance, Will Wilson, Attorney General of the State of Texas, Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, and Jesse James, Treasurer of the State of Texas, and each of them, are Defendants, when came each of the parties of record and announced ready for trial, whereupon the Plaintiff advised the court that David B. Irons, a Defendant because he was a member of the State Board of Insurance when this case was filed, was no longer a member of the State Board of Insurance and, therefore, the Plaintiff moved to dismiss the said Defendant, David B. Irons, and in Plaintiff's Eighth Amended Original Petition joined his successor, J. P. Gibbs as Defendant, and trial by jury being waived by each and all of the parties, the court proceeded and heard the pleadings, the evidence and the argument of counsel, and after

being fully apprised is of the opinion and finds that the law and the facts are with the Plaintiff, Todd Shipyards Corporation, and that Plaintiff should recover the sum of \$20,605.53 of and from the State Board of Insurance and that Texas Insurance Code, Article 21.38(2)(e) is unconstitutional and void as applied to the insurance premiums described in the Plaintiff's Eighth Amended Original Petition and the taxes unlawfully exacted from Plaintiff.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED by the Court that Plaintiff, Todd Shipyards Corporation, do have and recover of and from the State Board of Insurance, a body politic duly created and existing under the laws of the State of Texas, and the members of such Board in their representative capacities, Penn J. Jackson, Robert W. Strain and J. P. Gibbs, the sum of \$20,605.53 together with the pro-rata interest earned thereon while held in suspense in accordance with the provisions of Texas Revised Civil Statutes, Article 7057b.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that Jesse James, Treasurer of the State of Texas, is hereby ordered and directed to refund said \$20,605.53 together with the pro-rata interest earned thereon to Plaintiff, Todd Shipyards Corporation, by the issuance and countersigning of a Refund Warrant, in accordance with Texas Revised Civil Statutes, Article 7057b, and to take any and all other action necessary to refund said moneys to Plaintiff in accordance with Texas Revised Civil Statutes, Article 7057b.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, is hereby ordered and directed to write and sign such Refund Warrant, and, after such Warrant is properly charged against the suspense account, the said Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, is hereby ordered and directed to deliver such Refund Warrant to Plaintiff, Todd Shipyards Corporation, and to take any other action necessary to refund said moneys to Plaintiff in accordance with Texas Revised Civil Statutes, rticle 7057b.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that although this judgment is also against the Defendant, Will Wilson, Attorney General of the State of Texas, it is not necessary for him to take any action to accomplish the refund of the moneys unlawfully collected from the Plaintiff, and this judgment is entered against him only insofar as required by Texas Revised Civil Statutes, Article 7057b.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by the Court that the Defendant, David B. Irons, should be and he is hereby dismissed without prejudice.

All costs incurred in this proceeding are taxed against the State Board of Insurance.

To the foregoing judgment of the Court, the Defendants, and each of them, duly excepted in open

—B-4—

court and duly gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District, sitting at Austin, Texas.

SIGNED at Austin, Texas this 8th day of February, 1960.

/s/ J. Harris Gardner

APPROVED AS TO FORM:

LIDDELL, AUSTIN, DAWSON & HUGGINS

By /s/ Charles R. Vickery, Jr.  
Charles R. Vickery, Jr.

By /s/ Meyer W. Witt  
Meyer W. Witt

Attorneys for Plaintiff

/s/ Bob Eric Shannon  
Assistant Attorney General  
Attorney for Defendants.



## APPENDIX "C"

### **Opinion of the Court of Civil Appeals in State Board of Insurance, et al, v. Todd Shipyards Corporation, No. 10,802**

Todd Shipyards Corporation, appellee, sued the State Board of Insurance, its members and other state officials to recover taxes paid under protest in accordance with the provisions of Art. 7057b, V.A.C.S.

The case was tried upon stipulated facts. Judgment for appellee for the taxes paid under protest was rendered.

The sole question presented is the constitutionality of the statute under which the taxes paid by appellee were exacted. This statute is Art. 21.38, Sec. 2 (e) of the Texas Insurance Code, V.A.C.S., which we quote:

"If any person, firm, association or corporation shall purchase from an insurer not licensed in the State of Texas a policy of insurance covering risks within this State in a manner other than through an insurance agent licensed as such under the laws of the State of Texas, such person, firm, association or corporation shall pay to the Board a tax of five per cent (5%) of the amount of the gross premiums paid by such insured for such insurance. Such tax shall be paid not later than thirty (30) days from the date on which such premium is paid to the unlicensed insurer."

The following material facts are taken from the stipulation of the parties.

Todd Shipyards Corporation is a New York Corporation duly licensed to do business in Texas. Since 1934 Todd has owned real and personal property located in Texas of a value in excess of \$900,000.00.

Todd has purchased insurance agreements covering Texas risks from Lloyds of London and Institute of London Underwriters of the following nature: 1. Industrial work property damage (2) Builders' risk (3) Drydocks (4) Pier and bulkhead collision (5) Product liability insurance, to the extent of the excess portion of that insurance.

Only transactions with the insurers above named are involved in this case. Each of such insurers is domiciled in London, England.

Each of the insurance agreements made the basis of the taxes involved in this suit was contracted for, delivered and paid for in New York City, New York, the domicile of Todd Shipyards Corporation.

Neither Lloyds of London nor the Institute of London Underwriters has a permit from the Texas State Board of Insurance to write insurance in Texas; neither insurer submits any statement of its condition to such Board, and the affairs of neither are subject to examination or subject to any control or supervision by such Board. Neither of such insurers has an office or agent in Texas.

Neither Lloyds of London nor the Institute of London Underwriters conducts any investigation of Texas claims in Texas, but the adjustment of losses, if, as and when occurring, are handled between Todd's agent in the New York office and the agent of Lloyds of London and the Institute of London Underwriters in New York City.

Neither Lloyds of London nor the Institute of London Underwriters has ever solicited Todd's insurance business or policies within the State of Texas.

The Texas plants or offices of Todd Shipyards Corporation do not correspond directly or indirectly nor conduct any negotiations or transactions directly or indirectly with Lloyds of London or the Institute of London Underwriters but all negotiations or transactions are handled by Todd's agent, Mr. Ed Costello, in New York City with the New York City Agents of the insurer or directly with the London office.

All decisions relative to the purchase of insurance and renewal of insurance, the extent and amount of coverage, the selection of insurance and confirmation of insurance contracts are made by Mr. Ed Costello in New York City acting for Todd Shipyards Corporation, and not in Texas.

Under these policies all losses are payable in New York City and all losses have in fact been paid in New York City. All premiums are payable in New York City and have been paid in New York City.

Todd Shipyards has its principal office, principal place of business and domicile in New York City, New York. Todd maintains and operates shipyards in New Jersey, Louisiana, Texas, California, Washington and South America.

Todd's Texas Plants are located at Pelican Island in Galveston County, Texas, and on the Houston Ship Channel in Harris County, Texas. Todd duly obtained a certificate of authority to do business in Texas issued by the Secretary of State of Texas in 1934 and has maintained such certificate in good standing and has duly filed all reports and paid all taxes, fees and charges levied against Todd for the privilege of doing business as a foreign corporation in Texas.

Since 1934 Todd has made large investments in real and personal properties essential to the conduct of its shipyard business which it has held and operated continuously since 1934.

Approximately 27% of Todd's volume of business was done in Texas in each of the years 1956, 1957, 1958 and 1959. The number of employees at the Texas plants varies with the amount of work, but in November, 1959, the number of employees was about 1500.

The principal type of activity performed at the Texas plants is similar to that in other plants located in other states, and the Galveston and Houston, Texas shipyards activity consists mainly of ship repair and conversion of ships from one type to

another, construction of vessels, various types of metal fabrication and construction, as well as the manufacture of industrial equipment and oil burners.

Todd purchased the insurance agreements of concern here through brokers located in New York and Canada, none of whom was a licensed insurance agent under the laws of Texas.

Such policies of insurance were signed and issued in England, and they state that while actual delivery is in England that the places of delivery, at the option of the insured, may be considered to be New York City. All of such policies were accepted by Todd in New York City. Most of them were for a period of one year. All renewals were negotiated outside of Texas. No premium was paid by or from Todd's plants or offices in Texas.

Todd's New York office sends copies of all policies affecting Texas plants and risks to its Texas offices.

In the case of builders' risk insurance, Todd's Texas office notifies Mr. Ed Costello in New York, Todd's New York insurance man, that Todd has entered into a construction or repair contract. Mr. Costello then applies to one of the New York insurance brokers for builders' risk insurance coverage on that particular vessel or contract; this application letter is signed by Mr. Costello in New York, an officer of the New York office, but the coverage is requested in the name of the Corporation's Texas

division and identifies Texas as the place where the work is to be performed.

When a loss occurs at the Texas plants of Todd the Texas plant informs Mr. Costello at Todd's New York office by telephone or memorandum. Mr. Costello then notifies in New York the New York brokerage house in New York that negotiated the insurance; the New York broker in turn appoints the London Salvage Association to prepare an estimate or "survey" of the loss. In some instances Todd's New York office notifies the London Salvage Association that a survey is requested. The Texas plant of Todd also appraises the amount of its loss. After appraisal, the London Salvage Association forwards its estimate or survey to Todd's New York office, and Todd then submits the survey to the particular insurance broker to be used in adjusting the amount of the loss. The local plant of Todd assists the London Salvage Association in arriving at a fair figure for the loss. The London Salvage Association issues a bill to Todd Shipyards for the London Salvage Association's service, and such bill is paid in New York City by Todd Shipyards Corporation.

The adjusting of the loss is carried on by Lloyds through the insurance broker in New York and Mr. Costello in New York. The insurance broker submits its adjustment figure and recommendation to Lloyds in London and the Institute of London Underwriters for final approval. After the figure and adjustment of loss is approved, the New York office is notified by the insurance broker or the under-

writer and the New York office then notifies the Texas plants that the claim will or will not be paid.

The tax levied by the State on premiums paid by Todd Shipyards Corporation on policies purchased from Lloyds of London and the Institute of London Underwriters, "unadmitted insurers," is at the rate of five per cent of the gross premiums. The tax on similar premiums paid to admitted insurers and persons transacting an insurance business in the State of Texas is at rates of a maximum of 3.85% to a minimum of 1.1%, Article 21.38, Texas Insurance Code and Article 7064, V. A. C. S.

The administrative agencies of the State through which the monies collected under Sec. 2(e), supra, passed, treated such funds as funds derived from occupation taxes are treated.

It is the contention of appellee that Sec. 2(e), Art. 21.38, supra, is violative of the "due process" clauses of the Constitution of the United States and Texas (Sec. I, 14th Amendment, Art. 1, Sec. 19, respectively) and of the "equality and uniformity" clause of the Texas Constitution (Secs. 1 and 2, Art. 8), and the equal protection clause of the United States Constitution (Sec. 1, 14th Amendment).

We believe that invalidity and unconstitutionality of this statute is established by the opinion of the United States Supreme Court in *St. Louis Cotton Compress Company v. State of Arkansas*, 260 U. S. 346, 67 L. ed. 297, from which we quote:



“This is a suit by the state of Arkansas against a corporation of Missouri authorized to do business in Arkansas. It is brought to recover 5 per cent on the gross premiums paid by the defendant, the plaintiff in error, for insurance upon its property in Arkansas, to companies not authorized to do business in the state. A statute of the state purports to impose a liability for this amount as a tax. Crawford M. Dig. (1921) Sec. 9967. The answer alleged that the policies were contracted for, delivered, and paid for in St. Louis, Missouri, the domicile of the corporation, because the rates were less than those charged by companies authorized to do business in Arkansas. It also alleged that long before the taxing act was passed the defendant had made large investments in Arkansas in real and personal property essential to the conduct of its business, which it had held and operated ever since. The plaintiff demurred. The lower court overruled the demurrer, but the supreme court sustained it, holding that the statute denied to the defendant no rights guaranteed to it by the 14th Amendment. Judgment was entered for the plaintiff, and the case was brought by writ of error to this court.

“The supreme court justified the imposition as an occupation tax,—that is, as we understand it, a tax upon the occupation of the defendant. But this court although bound by the construction that the supreme court may put upon the statute, is not bound by the characterization of it, so far as the characterization may bear upon the question of its constitutional effect. *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 362, 59 L. ed. 265, 271,

35 Sup. Ct. Rep. 99. The short question is whether this so-called tax is saved because of the name given to it by the statute, when it has been decided in *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427, that the imposition of a round sum, called a fine, for doing the same thing, called an offense, is invalid under the 14th Amendment. It is argued that there is a distinction because the Louisiana statute prohibits (by implication) what this statute permits. But that distinction, apart from some relatively insignificant collateral consequences, is merely in the amount of the detriment imposed upon doing the act. The name given by the statute to the imposition is not conclusive. *Bailey v. Drezel Furniture Co.*, 259 U. S. 20, 66 L. ed. 817, 21 A. L. R. 1432, 42 Sup. Ct. Rep. 449; *Lipke v. Lederer*, 259 U. S. 557, 66 L. ed. 1061, 42 Sup. Ct. Rep. 549. In Louisiana the detriment was \$1,000 Here it is 5 per cent upon the premiums,—which is 3 per cent more than is charged for insuring in authorized companies. Each is a prohibition to the extent of the payment required. The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the state. This case is stronger than that of *Allgeyer* in that here no act was done within the state, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the state may regulate the jurisdiction. It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside."

Judgment sustaining the statute was reversed:

We quote from appellant's brief their answer to this case:

"The *Allgeyer*<sup>1</sup> and the *St. Louis Compress* cases were decided respectively in 1896 and 1922. Since then, the authority of those cases have been questioned in subsequent opinions by the United States Supreme Court. The emphasis of the Court now has moved away from the conceptualistic theories of place of contracting and performance of the contract onto the consideration of the citizen insured or the protection of the state from the incident of loss. The *Osborn* and *Hoopeston* cases, *supra*, make it clear that the approach taken by the court to these regulatory matters has changed. As said in the *Hoopeston* case:

" 'In determining the power of the State to apply its own regulatory laws to insurance business activities, the question in the earlier cases became involved by conceptualistic discussion of theories of the place of contracting or preformance. More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of those isolated factors. This interest may be measured by highly realistic consideration such as the protection of a citizen insured or the protection of a state from the incidents of loss. . . . '

---

<sup>1</sup> Cited in *St. Louis Compress Co. v. Arkansas*.

<sup>2</sup> *Osborn v. Ozlin*, 310 U. S. 53, 84 L. ed. 1074, *Hoopeston v. Cullen*, 318 U. S. 313, 87 L. ed. 777.

“The Court continued:

“The actual physical signing of the contract may be only one element of a broad range of business activities. Business may be done in a state although those doing the business are scrupulously careful to see that not a single contract is ever signed within that state's boundaries. Important as the execution of a written contract may be, it is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.

“... as the analysis of those opinions clearly indicates, the Allgeyer line of decisions cannot be permitted to control cases such as this, where the public policy of the state is clear, the insured interest is located in this state and there are many points of contact between the insurer and the property in the state.”

Neither the Cotton Compress case nor the Allgeyer case has been overruled. For that matter, the Court expressly declined to overrule such cases in *Compania Gen. De Tabacos v. Collector of Int. Rev.*, 275 U. S. 87, 72 L. ed. 177.

We are confident that the Supreme Court of the United States, enlightened by its own criticism of the Allgeyer and Cotton Compress cases, will, upon proper application, re-examine those cases and pronounce a decision sustaining the Legislature of Texas in enacting this statute for the protection

of its citizens in a field subject to rigid regulation by the State. Until such time, however, it is our duty to follow those cases. This we do, and affirm the judgment of the Trial Court.

Robert G. Hughes, Associate Justice,

Affirmed.

Filed: November 16, 1960.

**APPENDIX "D"**

*Per Curiam Opinion of the Supreme Court of Texas  
in State of Texas v. Todd Shipyards Corporation,  
No. A-8150*

We are of the opinion that the decision in this case is controlled by *Allgeyer v. Louisiana*, 165 U. S. 578, 17 S. Ct. 427, 41 L. ed. 832 and *St. Louis Cotton Compress Company v. State of Arkansas*, 260 U. S. 346, 43 S. Ct. 125, 67 L. ed. 297. We are unwilling to take the position that in view of *Osborn v. Ozlin*, 310 U. S. 53, 60 S. Ct. 758, 84 L. ed. 1074 and *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313, 63 S. Ct. 602, 87 L. ed. 777, the Supreme Court of the United States will probably overrule the *Allgeyer* and *Cotton Compress* cases. We abide by what the Supreme Court has held and refuse to speculate upon what said Court may hold. The application for a writ of error is refused, no reversible error.

## APPENDIX "E"

### Unauthorized Insurance    State Taxation    Direct Placements

<i>State</i>	<i>Rate of Tax*</i>	<i>Statute**</i>
1. Alabama	4%—imposed on person placing Insurance.	Title 28, Sec. 76, Alabama Code
2. Alaska	3%—imposed on non-admitted insurer—insured liable if insurer fails to pay tax.	Compiled Laws of Alaska, Anno 1949 as amended, Section 42-1-15
3. Arkansas	2% of premium charged—insured required to withhold and remit amount of tax.	Arkansas Statutes, 1947, as amended, Section 66-2926
4. Florida	3% of premium charged—insured required to withhold and remit amount of tax.	Florida Statutes, as amended, Section 626. 0535
5. Georgia	Insured required to pay same rate as premium tax imposed on admitted insurer, plus license fee of insurer.	Georgia Laws of 1941, as amended, Section 56-524
6. Iowa	2%—imposed upon insurer or insured	Iowa Code 1958, as amended, Section 515. 137
7. Louisiana	5%—imposed upon insured.	Title 22, Section 1265 B. Revised Statutes of 1950, as amended.
8. Maryland	2½% of premium charged—imposed on insured.	Art. 48-a, Section 128, Annotated Code of Maryland
9. Michigan	Same rate as admitted insurers—2% fire, 3% casualty—imposed on insured.	Act 218, Public Acts 1956, Section 1840
10. Minnesota	2%—imposed upon insured who is required to obtain a license.	Minnesota Statutes 1953, as amended 1957 by Chapter 475, Section 71. 24

\*Tax upon gross premiums unless otherwise noted.

\*\*References are to Sections of the Insurance Laws or Insurance Code unless otherwise noted.



—E-2—

<i>State</i>	<i>Rate of Tax*</i>	<i>Statute**</i>
11. Missouri	5% of net premiums— imposed upon insured who must obtain license.	RSMo. 1949, as amended, Section 375. 100
12. Montana	2% of net premiums— imposed upon insured who must obtain license.	Chap. 286, Laws 1959, Section 40-3427
13. New Hampshire	4%—imposed upon insured.	RS N. H., Annotat- ed, 1955, as amend- ed §405:20
14. New Jersey	3%—imposed upon insured.	Chap. 32, Laws 1960, Section 30
15. No. Carolina	5%—insured required to withhold.	Gen. Stat. N. C. 1953, as amended Section 58-53. 3
16. Ohio	5% of gross premiums paid or payable— im- posed on insured.	Rev. Code Ohio, 1953, as amended Sec. 3905. 36
17. Pennsylvania	Same rate as admitted companies—insured re- quired to withhold and pay.	Act No. 262, July 6, 1917, P. L. 723, p. 180.
18. So. Dakota	5%—imposed on insured.	So. Dak. Code 1939, as amended, §31. 1102
19. Tennessee	Same rate as admitted insurers—tax imposed upon insured.	Tennessee Code, Section 56-318
20. Wisconsin	3% of net premiums— imposed on insurer, but insured liable if insurer fails to pay.	Wis. Stats., 1957, as amended, §76. 33
21. Wyoming	5%—imposed on insured.	Wyom. Comp. Stats. 1945 as amended, Section 32-2302
22. Idaho***	3%—imposed on insured.	Idaho Laws 1961, Ch. 330, §277

\* Tax upon gross premiums unless otherwise noted.

\*\* References are to Sections of the Insurance Laws or Insurance Code unless otherwise noted.

\*\*\* Idaho Code becomes effective January 1, 1962.

Office Supreme Court, U.S.  
**FILED**

**JUN 16 1961**

CLERK OF SUPREME COURT, U.S.

No. **144**

IN THE

**Supreme Court of the United States**

**October Term, 1960**

**STATE BOARD OF INSURANCE, ET AL.,** *Petitioners*

**v.**

**TODD SHipyARDS CORPORATION,** *Respondent*

**BRIEF IN OPPOSITION TO PETITION  
FOR CERTIORARI**

**LIDDELL, AUSTIN, DAWSON  
& SAPP**

**516 Golf Building  
Houston 2, Texas**

**FRANK A. LIDDELL  
CHARLES R. VICKERY, JR.**

*Attorneys for Respondents*

*Alpha Law Book Co., 400 N. G. St., Houston 2*

## SUBJECT INDEX

	PAGE
STATEMENT OF THE CASE	1
(1) The Unadmitted Insurance Tax Is An Occupation Tax And Not A Regulation	1
(2) The Unadmitted Insurance Tax Discriminates Against Unadmitted Insurers And Favors Texas Insurers	3
(3) The Unadmitted Insurance Tax Is Not Confined To Texas Residents	3
(4) Respondent's Domicile Is New York State	4
(5) Respondent Has Paid All Taxes Required For The Privilege Of Doing Business In Texas	5
QUESTIONS PRESENTED	5
(1) Does The Court Have Jurisdiction When (1) The Texas Supreme Court May Have Rested Its Judgment Upon An Adequate State Ground, And (2) The Petitioner, State Board Of Insurance, Et Al, Was Not The Petitioner In The Application For Writ Of Error Filed In The Texas Supreme Court?	5
(2) Is The Texas Unadmitted Insurance Tax Levied On Respondent's New York Contracts And Premium Payments Unconstitutional Under The Due Process Clause Of The U. S. Constitution's Fourteenth Amendment As Held By The Texas Courts On The Authority Of <b>St. Louis Cotton Compress Co. v. State Of Arkansas</b> , 260 U.S. 346? Since Petitioner Does Not Distinguish <b>St. Louis Compress</b> , The Question Simply Becomes, " <b>Should St. Louis Cotton Compress</b> " Be Overruled?	6
(3) Is The Arbitrary Discrimination Against Unadmitted Insurers And In Favor Of Texas Insurers Embodied In The Texas Unadmitted Insurance Tax Unconstitutional Under The Equal Protection Clause Of The U. S. Constitution's Fourteenth Amendment?	6

## II

ARGUMENT	PAGE
	6
(1) The Jurisdiction Question	6
(2) The Federal Due Process Question	10
(a) <b>St. Louis Cotton Compress Co.</b> , 260 U.S. 346 controls this case	10
(b) <b>Osborn and Hoopston Canning Co.</b> do not support Petitioners' position	13
(c) <b>St. Louis Cotton Compress Co.</b> establishes a sound public policy	14
(3) The Federal Equal Protection Question	16
(a) "Equal Protection" condemns the state's at- tempt to favor domestic insurers and discrim- inate against foreign insurers	16
(b) The exemption of domestic insurers from the tax denies equal protection	19
PRAYER	21
CERTIFICATE OF SERVICE	21

### III

## LIST OF AUTHORITIES

CASES	PAGE
Agnew v. Coleman County Elec. Coop., 153 Tex. 587, 272 S.W.2d 877	8
Allied Stores v. Bowers, 358 U.S. 522	15, 18
Connecticut General Life Insurance Co. v. Johnson, 303 U.S. 77	12, 13, 15
Durley v. Mayo, 351 U.S. 277	9
F. T. C. v. Travelers H. A., 363 U.S. 293	11
Hanover Fire Insurance Co. v. Carr, 272 U.S. 494	16, 17, 19
Hoopston v. Cullen, 318 U.S. 313	13, 14
Morey v. Doud, 354 U.S. 457	20
Osborn v. Ozlin, 310 U.S. 53	13, 14
St. Louis Cotton Compress Co. v. State of Arkansas, 260 U.S. 346	6, 7, 10, 11, 12, 13, 14, 15, 16
Stembridge v. Georgia, 343 U.S. 541	9
Texas Osage Cooperative v. Van Clark, —Tex.—, 322 S.W.2d 506	7
Travelers Health Association v. Virginia, 339 U.S. 643	13, 14
Wheeling Steel Corp. v. Glander, 337 U.S. 562	17, 18, 19
CONSTITUTION OF THE UNITED STATES	
Fourteenth Amendment	6
CONSTITUTION OF TEXAS	
Article VII, Section 3	2, 9
Article VIII, Sections 1 and 2	6, 9, 10
TEXAS STATUTES	
Article 7064	4
Laws of 55th Regular Session, Chap. 395, Sec. 7	2
TEXAS RULES OF CIVIL PROCEDURE	
Rule 483	7, 8
TEXAS INSURANCE CODE	
Article 21.38	4
Article 21.38(2)(d)	2
Article 21.38(2)(e)	2, 3, 4, 6
MISCELLANEOUS	
1945 Congressional Report on McCarran-Ferguson Act	11, 16

No. 1030

---

IN THE  
**Supreme Court of the United States**  
October Term, 1960

---

STATE BOARD OF INSURANCE, ET AL., *Petitioners*

v.

TODD SHIPYARDS CORPORATION, *Respondent*

---

**BRIEF IN OPPOSITION TO PETITION  
FOR CERTIORARI**

---

*To the Supreme Court of the United States:*

**STATEMENT OF THE CASE**

Petitioners' statement is substantially correct, but it does not fully present the controlling facts, and therefore, Respondent submits its supplemental "Statement of the Case".

1.

**THE UNADMITTED INSURANCE TAX IS AN  
OCCUPATION TAX AND NOT A REGULATION**

After the enactment of the tax in 1957, the Texas State Board of Insurance and the Texas Comptroller of Public Accounts administratively determined that the unadmitted

insurance tax is an occupation tax (See State Board of Insurance Annual Reports for 1957, 1958 and 1959, S.F. p. 8, Pl. Ex. 4; S.F. p. 10, Pl. Ex. 5; S.F. p. 11, Pl. Ex. 6; S.F. pp. 11 and 12, S.F. pp. 19-24; See also the Factual Stipulation, Pl. Ex. 1, S.F. p. 2).

The Comptroller of Public Accounts has set aside one-fourth of the tax to the public free school fund as required of all "occupation taxes" by Texas Constitution Article VII, Section 3. This was done solely because the Comptroller classified the unadmitted insurance tax as an occupation tax (S.F. p. 26).

Although, at the time of the trial, Petitioners argued that the tax was a regulation and not an "occupation tax", the Comptroller was continuing to disburse the tax as an "occupation tax". Since the Comptroller has always classified the tax as an occupation tax, the Respondent's current argument that the tax is not really an occupation tax is without force.

Moreover, in the statute the Legislature expressly declared its purpose in Sec. 7:

"Sec. 7. The fact that the present laws relating to the placement of surplus lines of insurance do not provide adequately for the conditions under which it shall be placed with the unauthorized insurers in a manner which *will insure the collection* of the tax levied upon the premiums charged or paid for such insurance. . . ." (Sec. 7 of Chap. 395, Laws of 55th Regular Session) (Emphasis added)

In the light of this avowed declaration of intention to insure collection of the tax, i.e., the collection of the tax theretofore levied in Article 21.38 (2) (d) (*Texas Insurance Code*) and thereupon levied in Article 21.38 (2)



(e), Petitioners' argument of a different intention is untenable. The 1957 amendment simply eliminated the only possibility—paying premiums directly to "unauthorized insurers"—for avoiding the discriminatory five per cent (5%) tax.

The legislative purpose—to tax and to collect the tax—was carried into effect by the Comptroller's construction.

Petitioners' attempt to renounce the Legislature's avowed tax purpose is an untimely afterthought induced by this case.

Respondent's argument that the tax was part of a regulatory scheme to protect Petitioner from its own credulity in buying from "unadmitted insurers" is thoroughly squelched by the testimony of the Texas Commissioner of Insurance (S.F. p. 19):

"Q. Do you do anything to try to regulate where or from whom Todd Shipyards buys its insurance?

A. No, sir."

Even though the State Court did not specifically hold the unadmitted insurance tax to be a "Tax" rather than a "Regulation", if such a holding is necessary to support the judgment, it must be implied.

## 2.

### THE UNADMITTED INSURANCE TAX DISCRIMINATES AGAINST UNADMITTED INSURERS

This tax on Petitioner's premium payments in New York to "unadmitted insurers" is at the rate of five per cent (5%). The tax on similar premiums paid to "admitted insurers" is levied at rates from 3.85% to a minimum of

1.1% (Article 21.38, *Texas Insurance Code*, and Article 7064 of *Texas Revised Civil Statutes*) (Stipulation—Pl. Ex. 1, page 3, S.F. p. 2; see also Court of Civil Appeals Opinion, 340 S.W. 2d 339, 342).

Since premiums paid to unadmitted insurers are taxed at the rate of five per cent (5%) and premiums paid to admitted insurers are taxed at smaller rates—varying from 3.85% to a minimum of 1.1%—the tax deliberately discriminates against the placing of insurance with unadmitted insurers and in favor of Texas insurers.

The tax is plainly discriminatory and deliberately favors "admitted" insurers.

## 3.

### THE UNADMITTED INSURANCE TAX IS NOT CONFINED TO PAYMENTS BY TEXAS RESIDENTS

The plain language of Article 21.38 (2) (e) levies the tax not on Texas residents, but on "any person, firm, association or corporation" purchasing insurance from an unadmitted insurer covering Texas risks other than through a licensed agent. *Nowhere in the Statute are non-residents insuring Texas risks exempted from the tax.* The word "resident" does not appear in Article 21.38 (2) (e).

## 4.

### RESPONDENT'S DOMICILE IS NEW YORK STATE

The Petition (p. 10) states, "Respondent is a Texas resident".

Respondent does not know in what sense "resident" is used by Petitioner, but the factual stipulation (Pl. Ex. 1,

S.F. p. 3) clearly established Respondent's domicile in New York:

"Todd Shipyards has its principal office, principal place of business and domicile in New York City, New York. . . ."

Respondent is a resident of Texas only in the sense that each foreign corporation having a place of business and a permit to do business in Texas is a Texas resident.

## 5.

### RESPONDENT HAS PAID ALL TAXES REQUIRED FOR THE PRIVILEGE OF DOING BUSINESS IN TEXAS

Since 1934 Respondent has duly maintained its permit to do business and has duly paid all taxes, fees and charges levied against Respondent for the privilege of doing business in Texas. (Factual Stipulations, Pl. Ex. 1, p. 3, S.F. p. 2).

### QUESTIONS PRESENTED

#### (1)

Does the Court have jurisdiction when (1) the Texas Supreme Court may have rested its judgment upon an adequate state ground, and (2) the Petitioner, State Board of Insurance, et al., was not the Petitioner in the Application for Writ of Error filed in the Texas Supreme Court?

#### (2)

Is the Texas Unadmitted Insurance Tax levied on Respondent's New York contracts and premium payments unconstitutional under the Due Process clause of the U. S.

Constitution's Fourteenth Amendment as held by the Texas Courts on the authority of *St. Louis Cotton Compress Co. v. State of Arkansas*, 260 U.S. 346? Since Petitioner does not distinguish *St. Louis Compress*, the question simply becomes, "Should *St. Louis Cotton Compress* be overruled?"

(3)

Is the arbitrary discrimination against unadmitted insurers and in favor of Texas insurers embodied in the Texas Unadmitted Insurance Tax unconstitutional under the Equal Protection Clause of the U. S. Constitution's Fourteenth Amendment?

## ARGUMENT

(1)

### THE JURISDICTION QUESTION

The Petitioner's Application for Writ of Error in the Texas Supreme Court assigned, among others, the following errors:

#### POINT II.

The Court of Civil Appeals Erred in Holding that Article 21.38, Section 2, Subsection (e) of the Texas Insurance Code is Unconstitutional as a Violation of Due Process, Section 19, Article I of the Texas Constitution.

#### POINT IV.

The Court of Civil Appeals Erred in Failing to Pass on and in Failing to Hold that Article 21.38, Section 2, Subsection (e) of the Texas Insurance Code is Constitutional and Not a Violation of the Equality and Uniformity Clauses of the Texas Constitution, Section 1 and 2, Article VIII.

The Trial Court judgment did not specify the grounds of unconstitutionality supporting the judgment. The Court of Civil Appeals (340 S.W. 2d 339, 342) recognized the grounds to be:

"It is the contention of appellee that Sec. 2 (c), Art. 21.38, supra, is violative of the "due process" clauses of the Constitutions of the United States and Texas (Sec. 1, 14th Amendment, Art. 1, Sec. 19, respectively, Vernon's Ann. St.) and of the "equality and uniformity" clause of the Texas Constitution (Secs. 1 and 2, Art. 8), and the equal protection clause of the United States Constitution (Sec. 1, 14th Amendment)."

Although the Texas Supreme Court stated in a per curiam opinion that the case was controlled by *St. Louis Cotton Compress*, 260 U.S. 346, the court, nevertheless, refused the writ with the notation "No Reversible Error". 343 S.W. 2d 241.

The refusal with the notation "No Reversible Error" means the Supreme Court recognizes that the Court of Civil Appeals has reached a correct result, but the Supreme Court does not necessarily approve the principle of law upon which the decision was based. (The Federal Due Process Point) *Texas Rules of Civil Procedure* No. 483, *Texas Osage Cooperative v. Van Clark*, —Tex.—, 322 S.W. 2d 506. Therefore, the highest Texas Court did not expressly approve the basis of decision in the Court of Civil Appeals and deliberately refused to limit the ground for the writ refusal to the Federal questions.

On the other hand, an "unqualified" refusal of the writ would have approved the holding and opinion of the Court of Civil Appeals as a correct statement of the law and con-

trolling principles *T. R. C. P. No. 483, Agnew v. Coleman County Elec. Coop.*, 153 Tex. 587, 272 S.W. 2d 577. Since the writ refusal was not "unqualified", the Court of Civil Appeals opinion does not establish the grounds for the state judgment.

Petitioner's Point II in the Texas Supreme Court assigned as error the holding that the statute was unconstitutional under the Texas due process clause, and Point IV assigned as error the failure to hold the statute was not unconstitutional under the Texas Uniformity and Equality Clauses.

Petitioner's Point II admits the Court of Civil Appeals and the Trial Court holding is grounded on an adequate state ground, to-wit: Texas Due Process. Since the judgments in the appellate court simply affirm the trial court judgment which may have been based on adequate state grounds, the refusal of the Writ in the Texas Supreme Court may have also been on this adequate state ground.

Petitioner also admits the Texas and U. S. due process clauses are coextensive in the Application for Writ of Error:

"The Petitioner's first two points of error will be discussed here because, fundamentally, the same issues are involved. In this connection, it is observed that it has been held that Article I, Section 19 of the Texas Constitution restricts the powers of the Legislature to the same extent as the due process clause of Section 1 of the 14th Amendment of the United States Constitution. *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 249."

After admitting that the Texas and Federal Due Process clauses are coextensive, Petitioner could not now, in good grace, deny the Texas Courts may have also held that Texas due process also condemns the tax.

The refusal with the notation "No Reversible Error" does not disclose the basis for refusal and does not negative the two adequate state grounds, but the notation deliberately announces the lower court opinion is not approved nor adopted. Thus, the refusal may have been based on an adequate state ground, to-wit: (1) The Texas Due Process Clause or the Texas Equality and Uniformity Clauses.

The controlling jurisdictional principle is now well settled by *Durley v. Mayo*, 351 U.S. 277, as follows:

"It is a well established principle of this Court that before we will review a decision of a state court it must *affirmatively appear* from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the case . . . And where the decision of the state court *might* have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it." (Emphasis added)

Since the Texas Supreme Court rendered no complete opinion and its judgment (Refusal of the Writ with the notation "No Reversible Error") *MIGHT* have also rested on the Texas Constitution's Due Process and Equality and Uniformity Clauses, this court should not take jurisdiction.

In *Stembridge v. Georgia*, 343 U.S. 541, the rule is stated:

"We are without jurisdiction when the question of the existence of an adequate state ground is debatable."

Since (1) Petitioners assigned as error in the Texas Application for Writ an adverse holding on the Texas Due



Process and Equality and Uniformity points, (2) The Texas Supreme Court carefully avoided limiting itself to one ground for refusal by the notation "No Reversible Error", and thereby also deliberately declined to limit itself to the grounds announced by the Court of Civil Appeals for affirmance, and (3) the affirmed Trial Court judgment does not specify a state or federal ground, the existence of an adequate state ground is clearly debatable.

Therefore, the record does not affirmatively demonstrate that the Federal Due Process question was necessary to a determination of the case. The Texas decision may have been grounded on the Texas Due Process and Equality points, either of which is sufficient to sustain the judgment.

The "State of Texas" rather than the State Board of Insurance, et al., was the Petitioner in the Texas Supreme Court, and State of Texas is apparently not a Petitioner in this court. The State of Texas is also a stranger to the judgment. (Petitioners' Appendix B-1). For these additional reasons, (1) an indispensable Petitioner has not joined in this Petition, and (2) a stranger to the judgment was the Petitioner in the Texas Supreme Court, jurisdiction should be declined.

(2)

## THE FEDERAL DUE PROCESS QUESTION

(A)

*St. Louis Cotton Compress Co.*, 260 U.S. 346 controls this case.

As stated in the lower court opinions, 340 S.W. 2d 339, and 343 S.W. 2d 241, *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, is indistinguishable and clearly condemns the Texas Unadmitted Insurance Tax.

Petitioner concedes that *St. Louis Cotton Compress Co.* controls, but, without ever clearly saying so, petitions the court to overrule *St. Louis Cotton Compress Co.*

Petitioner's argument that *St. Louis Cotton Compress Co.* is stale and "discarded" (Petition, page 13) is refuted by the recognition of its authority as late as *F. T. C. v. Travelers H. A.*, 362 U.S. 293, citing the 1945 Congressional Report on the McCarran-Ferguson Act.

"It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the states, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co. v. Arkansas* (260 U.S. 346) and *Connecticut General Life Insurance Co. v. Johnson* (303 U.S. 77), which hold, inter alia, *that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.*" (H.R. Rep. No. 143, 79th Congress, 1st Sess. 3) (Emphasis added)

When enacting the McCarran-Ferguson Act, the Congress clearly intended that Texas would have no power to tax Respondent's New York premium payments.

Petitioner suggests the entire scheme of insurance regulation be changed by overruling *St. Louis Cotton Compress Co.* so as to expand Texas power to New York insurance

contracts and premium payments. This will frustrate the congressional intention in enacting the McCarran-Ferguson Act and will disrupt the regulatory schemes of the fifty states.

In the cases that have distinguished *St. Louis Compress*, such as the *Osborn* (310 U.S. 53) and *Hoopston* (318 U.S. 313) cases, *St. Louis Compress* has been distinguished on the ground that the regulated insurance company was "admitted" in the state and the activities regulated were *not* extraterritorial. The sound distinction between *regulation within the state* and *taxation without the state* in no way lessens the force of *St. Louis Compress* when applied to Respondent's premium payments outside Texas.

*Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, condemns, as a due process violation, a California tax on reinsurance premiums paid to a Connecticut corporation admitted in California on contracts of reinsurance made in Connecticut with this statement:

"Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transaction or relationship between appellant and those originally insured, and called for no action in California . . . apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or in the reinsurance contracts. *No act in the course of their formation, performance, or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection.*

". . . All that appellant did in effecting the reinsurance was done without the state *and for its transac-*

*tion no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the State." (Emphasis added)*

The *Johnson* case squarely condemns an extra-territorial tax substantially similar to the unadmitted insurance tax, even though the risks were located in the taxing state and the insurer had a permit in the taxing jurisdiction. Respondent's insurers have no Texas permit.

(B)

OSBORN AND HOOPESTON CANNING COMPANY  
DO NOT SUPPORT PETITIONERS' POSITION

Petitioner's statement (Petition page 5) that *Osborn v. Ozlin*, 310 U.S. 53, *Hoopeston v. Cullen*, 318 U.S. 313, and *Travelers Health Association v. Virginia*, 339 U.S. 643, conflict "in principle" with *St. Louis Cotton Compress Company* is not justified.

In *Osborn v. Ozlin*, the statute provided that no insurance on Virginia property should be issued by an admitted insurer unless countersigned by a resident agent who was forbidden to share more than 50% of his commission with non-resident brokers, and the Court held that since (1) the statute was applicable only to admitted insurance companies, and (2) the statute was not aimed at taxing or prohibiting contracts beyond Virginia's borders, the insurance company was not denied due process, because Virginia had jurisdiction to regulate the Virginia activities of an admitted insurer. *Osborn v. Ozlin* specifically distinguished *St. Louis Compress Co.*, the *Tabacos* and *Allgeyer* cases on the basis that the statutes in *Allgeyer*, *St. Louis Compress* and *Tabacos* (1) were not directed at

the regulation of insurance within the state, but to the making of contracts outside the state, and (2) *The St. Louis Compress* tax did not tax an insurer having a permit in the taxing jurisdiction.

Since (1) the unadmitted insurance tax is identical to the Arkansas tax condemned in *St. Louis Compress*, and (2) *Osborn v. Ozlin* expressly distinguishes *St. Louis Compress*, the *Osborn* case is not in point.

Moreover, *Osborn v. Ozlin* does not uphold any tax and makes no comment on the State's power to tax premium payments in another state.

Petitioner also relies on *Hoopston Canning Co. v. Cullen*, supra, upholding New York's right to regulate an insurance company *licensed and doing business in New York*. The *Allgeyer* case is distinguished in *Hoopston Canning Co.* and therefore, the *Hoopston* case is no authority supporting the State's power to tax Respondent. *St. Louis Compress* is not mentioned.

*Hoopston* makes no holding nor comment on the State's power to tax premium payments in another State.

*Travelers Health Association v. Virginia*, supra, (1) is not a tax case, (2) does not overrule *St. Louis Compress Co.*, (3) upholds state regulation of insurance transactions within the state, (4) upholds substituted service, and (5) holds nothing on extra-territorial transactions. *Travelers Health Association* is not in point.

(C)

## ST. LOUIS COTTON COMPRESS CO. ESTABLISHES A SOUND PUBLIC POLICY

*St. Louis Cotton Compress's* policy of *preventing a State from favoring its own* and from taxing transactions in another state is sound.

Since the Congress relied on *St. Louis Cotton Compress Co.* in passing the McCarran-Ferguson Act, its departure would frustrate the congressional purpose, the State-Federal regulatory jurisdiction contemplated by the Act, and the current regulatory schemes throughout the fifty states. For instance, Texas could immediately tax the reinsurance contracts protected by *Connecticut General Life Insurance Co. v. Johnson*.

If New York and Texas are permitted to tax the same premium payments, there will inevitably result an unseemly race among the states to gain new tax sources by taxing extra-territorial transactions.

If Texas is allowed to tax New York premium payments, the State's taxing power is released to roam "unconfined and vagrant" on transactions in other states. This will not do, if "due process" and the Federal system are to survive. See Concurring Opinion in *Allied Stores v. Bowers*, 358 U.S. 522.

Since its historic revenue sources are inadequate, the Texas Legislature is now seeking to tax interstate commerce and extra-territorial transactions. This is evidenced by the recent condemnation of such taxes in this case, the gas gathering tax and the so-called severance beneficiary tax case. Overruling *St. Louis Cotton Compress* will invite the Texas Legislature to tax other extra-territorial transactions.

*St. Louis Compress Co. v. State of Arkansas*, establishes a sound policy, to-wit:

"It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside. . . ."

In a federal system, the wisdom of this policy is beyond question, and the policy may not be lightly cast aside.

Respondent submits that *St. Louis Compress* should not be overruled; the overruling of *St. Louis Compress* would frustrate the intent of the *McCarran-Ferguson Act* by greatly expanding state power to include the taxation of extra-territorial insurance transactions.

## 3.

## THE FEDERAL EQUAL PROTECTION QUESTION

## (A)

**"EQUAL PROTECTION" CONDEMNS THE STATE'S  
ATTEMPT TO FAVOR DOMESTIC INSURERS  
AND DISCRIMINATE AGAINST FOREIGN  
INSURERS.**

The deliberate discrimination embodied in the tax is in favor of premiums paid to admitted insurers (1.1% to 3.85% rate) and against premiums paid to unadmitted insurers (5% rate). (See Stipulation, Pl. Ex. No. 1, S.F., p. 2; C.C.A. Opinion, 340 S.W. 2d 339, 342.)

The unconstitutionality of a discrimination favoring domestic over foreign insurers has been well established since *Hanover Fire Insurance Company v. Carr*, 272 U.S. 494, invalidating under the equal protection clause, an Illinois net receipts tax levied on foreign corporations but exempting domestic corporations. The Court wrote at page 516:

"But an occupation tax imposed upon 100 percent of the net receipts of foreign insurance companies admitted to do business in Illinois is a *heavy discrimination in favor of domestic insurance companies of the same class and in the same business* which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent of the full value of the property. It is a de-



nial of the equal protection of the laws." (Emphasis added)

*Hanover Fire Insurance Company* teaches that "Equal Protection" prevents the state from imposing taxes that favor domestic insurers and discriminate against foreign insurers.

The United States Supreme Court has uniformly condemned as constitutionally "unequal" all attempts by the States to favor transactions with *residents* and to discriminate against transactions with *non-residents*. The leading case is *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, holding a tax on intangibles of a foreign corporation, although exempting identical intangibles of residents, is an unconstitutional classification. *Glander* plainly declares that state taxation may not establish classifications to *favor residents* and to *discriminate against non-residents*.

The Court said:

"It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but *solely because of the different residence of the owner*." (Emphasis added)

Respondent is not accorded equal treatment and the inequality is not because of the slightest difference in Texas' relation to the premium payment, but the inequality is solely because of paying premiums to "unadmitted" insurers. The inequality deliberately favors Texas insurers and deliberately discriminates against New York and London insurers.

*Glander* teaches that (1) a state tax must equally apply to its residents and a foreign corporation, and (2)

"Equal Protection" denies the states the right to favor their residents over non-residents. The Texas unadmitted insurance tax does not apply equally to admitted (residents) and unadmitted insurers (non-residents) and falls within the specific condemnation of *Glander*.

A more recent case, *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, upheld an Ohio tax favoring property of non-residents and discriminating against property of residents. Yet, the concurring opinion carefully preserves *Glander's* authority and declares that any State attempt to favor residents is "mechanically" condemned by the Fourteenth Amendment, i.e., discrimination in favor of residents is unlawful per se, because of the nature of our Federal system. The court wrote:

" . . . There is, therefore, no reason to judge the state action mechanically by the same principles as state efforts to favor resident. . . ."

The Texas unadmitted insurance tax may be condemned "mechanically", because it is a clear effort to favor residents and "those paying tribute to the state".

Although the Court has approved many different schemes of classification and has approved a classification favoring nonresidents over residents, *Allied Stores of Ohio v. Bowers*, supra, the Court has uniformly condemned all attempts by states to levy taxes discriminating in favor of domestic corporations and discriminating against foreign corporations.

The point Respondent makes is that equal protection prevents Texas from selecting a class for taxation so as to favor domestic insurers and to discriminate against foreign insurers. To state the point in yet another way, a classification of admitted and unadmitted insurers so as to favor

the admitted insurers is an arbitrary and unconstitutionally unequal classification.

It is true that the unadmitted insurance tax accomplishes its intended discrimination by distinguishing between "admitted" and "unadmitted" insurers and does not expressly base the discrimination on residence and non-residence or on domestic and foreign insurers. However, Respondent submits that there is no distinction between the unadmitted insurance tax's classification of "admitted and unadmitted insurers" and the classification of domestic and foreign insurers in *Hanover Fire Insurance Co.* The State's effort to favor admitted insurers and discriminate against unadmitted insurers is identical to and has the same vices as the State's efforts to favor domestic over foreign insurers. Each of these discriminations permits the State to favor its own, flies in the face of our Federal system and defies the limitations of "Equal Protection".

Respondent respectfully submits that the following classifications are constitutionally unequal:

- (1) Domestic-Foreign Corporation classification favoring domestic corporation (*Hanover Fire, Glander*)
- (2) Admitted-Unadmitted Insurance Company classification favoring admitted insurers, which is merely another way of saying domestic insurers—foreign insurers favoring domestic insurers.

### (B)

#### THE EXEMPTION OF DOMESTIC INSURERS FROM THE TAX DENIES EQUAL PROTECTION

The Texas taxable event is the *payment of premiums* on Texas risks. All persons paying premiums on Texas risks to admitted insurers are exempt. The arbitrary exemption of payments to admitted insurers renders the tax uncon-

stitutionally unequal. This "no-exemption" principle was followed in *Morey v. Doud*, 354 U.S. 457, when an Illinois license and regulatory statute applying to firms "selling or issuing money orders"—but exempting the American Express Company—was condemned as a denial of "Equal Protection".

In other words, after Illinois decided to regulate the "Selling and issuing of money orders" all people so selling and issuing are required by "Equal Protection" to be treated equally.

The *Morey* principle requires that all persons "paying premiums on Texas risks" be taxed equally and condemns the attempted Texas exemption in favor of payments to domestic insurers.

In a nutshell, Respondent's equality arguments are two-pronged:

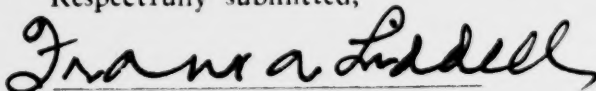
- (a) First:—Although the State may classify taxable events (premium payments on Texas risks), the State may not classify the persons performing the taxable event ("persons paying to admitted or unadmitted insurers"). The attempted classification of persons renders the tax constitutionally unequal.
- (b) Second:—Even though the State has the right to classify persons paying the taxed premiums, nevertheless, the attempted discriminatory classification in favor of payments to domestic (admitted insurers) and against foreign insurers (unadmitted insurers) is unreasonable so as to render the tax constitutionally unequal.

The distinction between (a) and (b) above is not always clearly drawn in the cases, yet Respondent submits that two "equality" questions are presented:

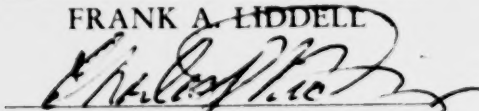
- (1) The right to classify persons paying premiums on Texas risks, vel non, and
- (2) The reasonableness of the classification—admitted and unadmitted insurers.

WHEREFORE, PREMISES CONSIDERED, Respondent prays the Petition for Certiorari be dismissed for want of jurisdiction and alternatively, (2) the Petition for Certiorari be denied, and (3) for such other and further relief and orders as may be appropriate in the premises.

Respectfully submitted,



FRANK A. LIDDELL



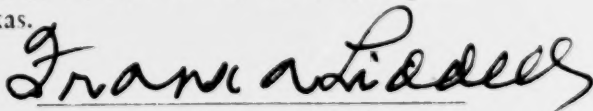
CHARLES R. VICKERY, JR.

Of Counsel:

LIDDELL, AUSTIN, DAWSON  
& SAPP  
510 Gulf Building  
Houston 2, Texas

### CERTIFICATE OF SERVICE

A copy of this Brief in Opposition to the Petition has been served pursuant to Supreme Court Rule No. 33 by depositing a copy of the Brief in a United States Mail Box, with first class postage prepaid, addressed to counsel of record for the Petitioner at his Post Office Address, Capitol Station, Austin 11, Texas.



FRANK A. LIDDELL

FILED

JUL 17 1961

JAMES K. BROWNING Clerk

No. [REDACTED] 144

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1960

STATE BOARD OF INSURANCE, ET AL,  
*Petitioners*

v.

TODD SHIPYARDS CORPORATION,  
*Respondent*

**PETITIONER'S ANSWER TO RESPONDENT'S BRIEF  
IN OPPOSITION TO PETITION FOR CERTIORARI**

WILL WILSON,  
Attorney General of Texas

C. K. RICHARDS,  
Assistant Attorney General

FRED B. WERKENTHIN,  
Assistant Attorney General

BOB E. SHANNON  
Assistant Attorney General  
*Counsel for Petitioners*  
*State Board of Insurance, et al*  
Capitol Station  
Austin 11, Texas

## INDEX

	Page
Citations to Opinions Below .....	i
Statement .....	1
Reply to Respondent's Question Number One .....	1
Reply to Respondent's Question Number Three .....	5
Conclusion .....	11

## CITATIONS

### *Cases:*

Allgeyer v. Louisiana, 165 U.S. 528 (1896) .....	2, 3, 4
Durley v. Mayo, 351 U.S. 277 .....	4
Hanover Fire Insurance Co. v. Carr, 272 U.S. 494 .....	10
McGeldrick v. Campangnie Generale, 309 U.S. 430 .....	5
St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346 (1922) .....	2, 3, 4
Stembridge v. Georgia, 343 U.S. 541 .....	4
Wheeling Steel Corp v. Glander, 337 U.S. 562 .....	9, 10

### *Statutes:*

Texas Insurance Code, Vol. 14, Vernon's Annotated  
Civil Statutes

Article 21.38, Section 2(e) .....	cited throughout
Article 4769 .....	6, 7
Article 7064 .....	6, 7
Article 7064a .....	6, 7

### *Others:*

16 CJS §76, page 236 .....	8
----------------------------	---



No. 1030

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1960

---

STATE BOARD OF INSURANCE, ET AL,  
*Petitioners*

v.

TODD SHIPYARDS CORPORATION,  
*Respondent*

---

**PETITIONER'S ANSWER TO RESPONDENT'S BRIEF  
IN OPPOSITION TO PETITION FOR CERTIORARI**

---

**Statement**

The Respondent, in its brief in answer to the petition for writ of certiorari, has raised two points not discussed in the petition for writ of certiorari, and for that reason the Petitioners file this reply brief.

**Reply to Respondent's Question Number One**

The Respondent, in its brief in opposition to the application for writ of certiorari, has questioned the jurisdiction of the Court to entertain this matter. Its position is that the Texas Supreme Court, in refusing

to grant the writ of error urged by the Petitioners by the notation of "ref. no rev. error," possibly grounded its basis for refusal on State constitutional grounds.

This argument is without merit for two main reasons: First of all, it is the judgment of the Court of Civil Appeals of Texas that the writ of certiorari prays be reviewed since the Supreme Court of Texas refused to grant Petitioners' writ of error. It is true that both State and Federal constitutional grounds were urged in the Court of Civil Appeals as reasons for reversing the judgment of the trial court. But it is crystal clear, upon a reading of the opinion of the Court of Civil Appeals, that it chose to invalidate Article 21.38(2) (e) of the Texas Insurance Code as a violation of the due process clause of the Fourteenth Amendment of the United States Constitution. That court explicitly stated the basis of its judgment in its opinion found on page C-7 of the appendix to the petition for writ of certiorari: "We believe that the invalidity and unconstitutionality of this statute is established by the opinion of the United States Supreme Court in *St. Louis Cotton Compress Co. v. State of Arkansas*, 260 U.S. 346 . . ." The *St. Louis* case decides that a state statute is a violation of the due process clause of the United States Constitution and, of course, that decision has nothing to do with the due process clause of the Texas Constitution.

The Court of Civil Appeals again states the basis of its judgment when it opines that it is its duty to follow the *St. Louis Compress* and the *Allgeyer v.*

*Louisiana* cases until such time as the United States Supreme Court overrules them.

Secondly, the per curiam opinion of the Texas Supreme Court in plain language reveals the reason it refused the Petitioners' writ of error. In Appendix "D" of the petition for writ of certiorari, there appears the opinion of the Supreme Court of Texas:

*"We are of the opinion that the decision in this case is controlled by Allgeyer v. Louisiana, 165 U.S. 578, 17 S. Ct. 427, 41 L. ed. 832 and St. Louis Cotton Compress Company v. State of Arkansas, 260 U.S. 346, 43 S. Ct. 125, 67 L. ed. 297. . . . We abide by what the Supreme Court has held and refuse to speculate upon what said Court may hold. . . ."* (Emphasis added.)

The Texas Supreme Court simply said that two Supreme Court cases, which decide rights under the Federal Constitution, control the present case. The Respondent speculates about the reason and effect of the refusal of the Petitioners' writ of error with the notation of no reversible error. The office of the per curiam opinion is to explain the reason for the refusal of the writ of error, which this per curiam opinion does admirably well—that the case is controlled by the *Allgeyer* and *St. Louis Compress* cases. And the Supreme Court refused to speculate, as did the Court of Civil Appeals, what the United States Supreme Court would hold on certiorari or appeal.

The cases cited by the Respondent in its answer to the petition for writ of certiorari are not in point here. In *Stembridge v. Georgia*, 343 U.S. 541, the Georgia Supreme Court wrote no opinion to indicate what ground its judgment was based on. Here the Texas Court of Civil Appeals and the Texas Supreme Court both wrote opinions setting forth the grounds relied upon. In *Durley v. Mayo*, 351 U.S. 277, relied upon by the Respondent, there was involved a *habeas corpus* proceeding which was refused by the Florida Supreme Court by an order stating that the petitioner had "failed to show . . . probable cause to believe that he is detained in custody without lawful authority . . ." The United States Supreme Court refused certiorari and said in part, "We find nothing on its face showing that the court must have decided the case on federal grounds rather than on the readily available and substantial state grounds." On the contrary, in the case at bar, there is an abundance of evidence showing the grounds for the judgments of both the Texas Court of Civil Appeals and the Texas Supreme Court. The opinions of both of these courts state the grounds for their decision—*St. Louis Cotton Compress Co. v. Arkansas* and *Allgeyer v. Louisiana*—which in turn invalidate state statutes as violations of Federal due process.

The Respondent has also challenged the jurisdiction of this Court on the basis that the many and various State officials sued by the Respondent were collectively termed "The State of Texas" for reasons of simplicity and brevity in the application for

writ of error filed in the Texas Supreme Court. With the answer to the Respondent's brief, Petitioners are filing, as a supplement to the record in this suit, an instrument called an "Instrument to Clarify the Identity of the Petitioners," which was filed in the Texas Supreme Court on December 12, 1960, before any action was taken by that court. That instrument fully explained the identity of the Petitioners as being the same as in the trial court and the Court of Civil Appeals, and that the term "State of Texas" had been substituted for the many individual State officials for purposes of simplicity and clarity.

### **Reply to Respondent's Question Number Three**

In the Respondent's question number three, it seeks to support the judgment of the State courts on the basis of the equal protection clause of the United States Constitution that, although presented, was not reached or passed upon below. The Petitioners doubt that this issue is before this Court, cf. *McGoldrick v. Campannie Generale*, 309 U.S. 430, but nevertheless answer these contentions.

The Respondent suggests that Article 21.38, Section 2(e), discriminates in favor of domestic insurance companies and against foreign insurance companies. This suggestion has no merit for the following reasons.

In the first place, Article 21.38(2) (e) does not discriminate against *foreign* insurers in favor of

*domestic* insurers. If it discriminates against anyone at all, it discriminates against *unauthorized* or *unregulated* insurers. An unauthorized insurer is simply any insurance company not licensed by the State Board of Insurance to sell insurance in Texas. Under the terms of the statute, it is immaterial where the residence of the unauthorized insurance company is, but the material point is whether or not the company is authorized to do business here. Article 21.38 (2) (e) applies to a variety of situations: Texas insurance companies that have never complied with the licensing laws of this State; Texas insurance companies that are licensed for one type of insurance, but are selling additional lines; unauthorized out-of-state companies; and unauthorized foreign companies. Nowhere in the Article does it say that an unauthorized company means a foreign company.

The Respondent seeks to make out discrimination against foreign insurance companies by comparing Article 21.38 (2) (e) with completely dissimilar state taxes. Articles 4769, 7064, and 7064a do not place a tax on persons buying insurance, but rather place a tax on insurance companies. Article 21.38 (2)(e) places its tax on the *insureds*, and not on insurers. It is apparent that these are two separate and different taxes which tax different subjects. Merely because an insurance company pays a lower tax than an individual in a different taxing situation is no basis to compare two entirely different taxes, and then complain of discrimination between rates. The incidence of the tax in Articles 4769,

7064, and 7064a is the *receipt of gross premiums by insurance companies*, while the incidence of the tax in Article 21.38 (2)(e), is *payment of premiums by insureds on Texas risks to unauthorized insurers*. It is manifest that these are entirely different taxes, with no basis for comparison.

Even if it be assumed that Article 21.38 (2)(e) is a tax on unauthorized insurers, it is apparent that there is no discrimination because, as stated in a footnote on page 12 of the petition for writ of certiorari, authorized companies pay various taxes which aggregate 5% or more of the gross premiums taxed.

Another flaw in Respondent's argument of discrimination by Article 21.38 (2)(e) against foreign insurance companies is that in this lawsuit there is no foreign insurance company or domestic insurance company, for that matter, involved. The Respondent is Todd Shipyards Corporation, a builder and repairer of ships and certainly by no stretch of the imagination an insurance company. Lloyds of London, the Respondent's insurer, the Respondent was careful to point out in its due process argument in its brief, is not a party to this suit and does not do business in Texas. At best, then, the Respondent is only an insured seeking to challenge the constitutionality of a state statute for its insurer. The Respondent would assume the role of its insurer so that it could raise the issue in this case of whether or not Article 21.38, Section 2(e), was discrimina-



tory against foreign insurers. The rule has been well-stated as follows:

“A person is ordinarily precluded from challenging the constitutionality of governmental action by invoking the rights of others, and it is not sufficient that the statute or administrative regulation is unconstitutional as to other persons or classes of persons . . .” 16 CJS, §76, p. 236.

Certainly Todd has no standing to challenge this statute on the basis that it discriminates against foreign insurers in favor of admitted insurers when it is not an insurance company. Were Lloyds of London party to this lawsuit, it could have legitimately raised this issue.

Then Respondent complains of discrimination from another standpoint. It complains that the Legislature, in limiting the tax of Article 21.38, Section 2(e), to persons insuring Texas risks with unauthorized insurers, was discriminatory against these persons and in favor of all those persons who did not purchase with unauthorized insurers. The Respondent's position seems to be that the classification of Article 21.38 (2)(e) is discriminatory and unreasonable because it does not encompass every insured in the State. The fallaciousness of this argument is apparent. Of course, anytime the Legislature selects a group to tax there are some persons who are not included in the class and who do not have to pay. This does not mean that the Legislature

is discriminatory in favor of these people and against those included in the taxable class. It is well settled that the Legislature has the power to classify objects for the purpose of taxation. The class of taxpayers set up by Article 21.38, Section 2(e), constitutes a particular class under the law; none within that class are exempt from the tax. It is only when individuals of a class are singled out for exemption that this constitutional objection is operative.

The legal test that this classification of taxpayers must pass is whether or not there exists a reasonable basis for this classification. The practice which this Article sought to prevent must be kept in mind, i.e., that some Texas insureds were purchasing insurance from unsupervised and unregulated companies. Upon this group, the tax was levied. The tax was not placed upon all persons insuring property in Texas, for there was no need to do so since most of them insure with regulated companies. In Petitioners' writ for certiorari, the hazards involved in insuring with unregulated companies were detailed, as was the necessity for plugging all possible leaks in the State's regulating scheme, and Petitioners will not at this time repeat. Suffice it to say, Petitioners believe that there exists ample evidence of the reasonableness of this legislation.

For these reasons, the authorities that Respondent has cited to the Court are inapplicable. The *Wheeling Steel Corp. v. Glander* case, 337 U. S. 562, cited by the Respondent, involved an Ohio statute

specifically exempting resident owners of intangibles from the tax while placing the identical tax on non-residents. This statute in no way resembles Article 21.38, Section 2(e). The Ohio statute taxes non-residents while exempting residents in the same situation. Article 21.38 (2) (e) taxes all persons who purchase insurance from unauthorized insurers without regard to their residence. Also, Article 21.38, Section 2(e), makes no attempt to discriminate in any way between foreign or domestic insurers—its basis for distinction is whether or not the company has a license to do business in Texas. An unlicensed company could be a domestic or foreign insurance company. The facts of the *Glander* case are not similar to those in this case. There the non-resident taxpayer upon whom the tax was placed was bringing the lawsuit claiming a denial of equal protection. In the case at bar, the Respondent claims a State denial of equal protection of foreign insurance companies. As said before, the Respondent is not a foreign insurance company and has no standing even to make an issue of this supposed discrimination.

*Hanover Fire Insurance Co. v. Carr*, 272 U.S. 494, is equally inapplicable to the case at bar because there, Illinois, by judicial decision, taxed foreign insurance companies licensed to do business in Illinois at a much higher rate than domestic insurance companies. Here again, it will be pointed out that Article 21.38, Section 2(e), does not classify its objects of taxation by residence.

### Conclusion

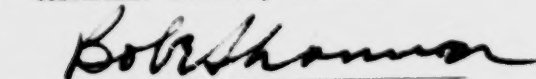
For the foregoing reasons, and those contained in the petition for writ of certiorari, Petitioners submit that certiorari should be granted.

Respectfully submitted,

WILL WILSON,  
Attorney General of Texas

  
C. K. RICHARDS,  
Assistant Attorney General

  
FRED B. WERKENTHIN,  
Assistant Attorney General

  
BOB E. SHANNON  
Assistant Attorney General

*Counsel for Petitioners*  
*State Board of Insurance, et al*

Capitol Station  
Austin 11, Texas

Office Supreme Court U.S.  
FILED

MAY 11 1961

JOHN F. DAVIS, CLERK

NO. 144

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1961

---

STATE BOARD OF INSURANCE, ET AL.,  
*Petitioners,*

v.

TODD SHIPYARDS CORPORATION,  
*Respondent.*

---

**PETITIONERS' REPLY BRIFF**

**WILL WILSON**  
Attorney General of Texas

**FRED B. WERKENTHIN**  
Special Assistant Attorney General

**BOB E. SHANNON**  
Assistant Attorney General

**COLEMAN GAY, III**  
Assistant Attorney General

Counsel for Petitioners  
Capitol Station  
Austin 11, Texas

---

---

NO. 144

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

---

STATE BOARD OF INSURANCE, ET AL.,

*Petitioners,*

v.

TODD SHIPYARDS CORPORATION,

*Respondent.*

---

## PETITIONERS' REPLY BRIEF

This brief is filed pursuant to the provisions of Rule 40(4) of the Revised Rules of this Court, to clarify what petitioners believe to be errors in respondent's brief, to meet its argument on the merits, and to clarify the issues in this case. Wherever possible, reference to petitioners' briefs, heretofore filed in this Court, is made in an attempt to minimize reiterations of our contentions made therein or elsewhere appearing in the Transcript of Record in this cause.

This reply brief, therefore, does not deal with petitioners' and respondent's conflicting views of the authorities cited in the briefs; to the extent they have not been

---

In addition to Petitioners' "Petition for a Writ of Certiorari to the Court of Civil Appeals," their "Answer to Respondent's Brief in Opposition to Petition for Certiorari," and the "Brief for the Petitioners," the Transcript of Record contains their "Application for Writ of Error" in the Supreme Court of Texas (Record, p. 243). Petitioners' contentions with respect to the principal cases are fully explored in

therein expounded, they will be clarified on oral argument.

### **Reply to Respondent's Statement of the Case**

Respondent's opening shot is an excoriation of petitioners' failure "to correlate the facts with due process principles — 'taxable event', location of the 'taxable event', and the 'nexus' between the 'taxable event' and Texas." (Respondent's Brief, p. 1) Respondent cites no authority for these "principles," although they form the axis of its brief. It is petitioners' position that these principles are not those determinative of this case.

The "nexus" argument (Respondent's Brief, pp. 8-12) is merely a balancing of Texas' and New York's contacts with the overall transactions involved, a procedure irrelevant to this case. The issue is not whether New York or Texas is the more appropriate jurisdiction to tax or regulate this transaction; this is not a choice-of-law case. Respondent's equation of "nexus" and "minimal contact" (Respondent's Brief, p. 8) is inapposite and oversimplified. Respondent's reference (Respondent's Brief, p. 29) to the "dual Federal System" characterizes its fundamental misconception of the issues involved.

This Court is increasingly required to reconcile the competing claims of different states to tax or regulate aspects of commercial operations overlapping state lines. This is a necessary concomitant of a Federal system, and to attempt analysis of this case within the rubric of a "dual Federal System" is to beg the principal question. This aspect of Federalism extends beyond the fields of insurance and taxation and is perennially before the Court. See, e.g., *Western Union Telegraph Co. v. Pennsylvania*, 30 U.S.L. Week 4037 (U. S. Dec. 4, 1961). A brief review of several decisions of this Court with respect to other aspects of this problem as it has matured is appended to this brief. (See Appendix A, *infra*.)



Respondent displays a chameleonic ability in shifting from its due process argument (Respondent's Brief, p. 8) to its equal protection argument (Respondent's Brief, pp. 38-44:); in the former it admits that any equalization effect of the regulatory scheme as a whole is of no moment to it, since it is not an insurance company, while in the latter it adopts the mantle of an insurance company in decrying the alleged discrimination against unauthorized insurers.

Respondent's brief fails to distinguish the subject of the tax from its measure; the "five per cent of premiums paid" is merely the measure of a tax on the privilege of insuring Texas risks through unauthorized insurers.

Respondent's fixation with the "taxable event" (see, *inter alia*, Respondent's Brief, pp. 1, 2, 3, 8, 12, 18, 19, 31, 33, 36, 43.) reflects similar thinking along the lines of choice-of-law cases, although the jargon is borrowed from income tax cases; it provides no aid in analysis and disposition of this case.

Respondent relies (Respondent's Brief, p. 15) on the stipulation (Record, p. 46) that it has, since 1934, duly maintained its Texas permit to do business and has duly paid all taxes, fees, and charges levied against it for such permit and has duly paid all taxes, fees, and charges levied against it for the privilege of doing business in Texas, from which premise it concludes that "Petitioner (*sic*) does (*sic*) not attempt to justify this tax as a tax for the granted privilege of doing business." This statement simply ignores the obvious fact that this suit is one to recover a portion of such taxes.

### **Reply to Respondent's Due Process Argument**

Respondent's argument (Respondent's Brief, pp. 26-28) that its business was developed in reliance on the decision in *Aliquyer v. Louisiana*, 165 U.S. 578 (1896), is

unsupported by the record, but, even if true, such reliance is scarcely catapulted to constitutional dignity by the decision in *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), as even those portions of the opinion quoted in respondent's brief demonstrate.

Respondent's argument (Respondent's Brief, pp. 28-29) concerning multiple taxation is met primarily in the appendix to this brief; however, the possibility of multiple taxation in this case is unsupported by the record, hypothetical, and contrary to fact.

On page 29, respondent refers to Judge (*sic*) Holmes' "genius for condensation"; not only is its subsequent quotation from the *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922), case out of context, it is also out of date (See Appendix A, *infra*); compare with the Justice's dissent in *Compania General De Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87 (1927). Respondent (Respondent's Brief, p. 30) again refers, without citation of authority, to "the conventional due process jurisdictional words of art, 'nexus, connection or minimal contact'"; as earlier indicated, petitioners do not regard these as controlling factors. *A fortiori*, petitioners regard such statements as "nexus must be based on existing 'taxable events' " (Respondent's Brief p. 33) as, at best, irrelevant. In this context, the opinions in *Compania (supra)*, upon which respondent heavily relies (Respondent's Brief, pp. 20-22), rather clearly refute the mechanical analysis urged by respondent.

The statement (Respondent's Brief, p. 34) that "some of the insurance is not available from Texas insurers" is not supported by the record.

The statement (Respondent's Brief, p. 35) that "Texas had absolutely no connection with the loss or its appraisal" is an obvious error, since the record reference (Record, p. 134) indicates that the damage was sustained


in consequence of the subject vessel's encountering heavy weather while in passage in tow of a tug from Houston, Texas, to Charleston, South Carolina.

The contentions raised by respondent's brief on other questions are adequately met in petitioners' briefs.


Respectfully submitted,

  
WILL WILSON

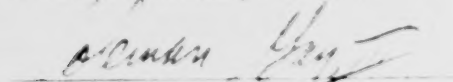
Attorney General of Texas

  
FRED B. WERKENTHIN

Special Assistant Attorney General

  
BOB E. SHANNON

Assistant Attorney General

  
COLEMAN GAY, III

Assistant Attorney General

Counsel for Petitioners,  
State Board of Insurance, et al.

Capitol Station  
Austin 11, Texas

## CERTIFICATE OF SERVICE

Copies of this Reply Brief have been served pursuant to Supreme Court Rule No. 33 by depositing five copies of the Brief in a United States Mail Box, with first class postage prepaid, addressed to each of counsel of record for the Respondent: Mr. Harry G. Hill, Cullen and Dykman, 177 Montague Street, Brooklyn, New York, and Messrs. Frank A. Liddell, and Charles R. Vickery, Jr., Liddell, Austin, Dawson & Sapp, 510 Gulf Building, Houston 2, Texas; and to counsel for Amici Curiae: Messrs. Cloyd Laporte and John Mason Harding, Dewey, Ballentine, Bushby, Palmer & Wood, 40 Wall Street, New York 5, New York.



Coleman Gay, III

## APPENDIX A

The problem of state taxation or regulation of activities which cross state lines has been met by this Court on numerous occasions under analogous situations, and this Court's opinions in some of these cases are mentioned here as characterizing the Court's approach to these problems.

### (1) MULTIPLE TAXATION

a. *Cream of Wheat Co. v. County of Grandforks*, 253 U.S. 325 (1920): "To this it is sufficient to say that the Fourteenth Amendment does not prohibit double taxation." (*id* at 330).

b. *Wheeling Steel Corp. v. Fox*, 298 U.S. 193 (1936): This case recognizes a permissible triple taxation under certain circumstances, with reference to so-called "unit rule" corporations.

c. *Minnesota v. Blasius*, 290 U.S. 1 (1933): This case permits state taxation of goods in interstate commerce and subject to Federal regulation.

### (2) EXTRATERRITORIAL TAXATION

*Empresa Siderurgica v. County of Merced*, 337 U.S. 154 (1949): This case sustained a property tax on goods sold to a resident of a foreign country, which goods were located in the taxing state (California) on tax day.

### (3) THE IMPORTANCE OF LABELS

a. The case of *Nebraska ex rel Beatrice Creamery Co. v. Marsh*, 282 U.S. 799 (1930), and the *Cream of Wheat* case (*supra*) provide an illuminating contrast, since in *Beatrice Creamery* the result in the state court (*sub nom. State ex rel Beatrice Creamery Co. v. Marsh*, 119 Neb. 197, 277 N. W. 926 (1929)) was reached in part by characterizing the challenged tax as a franchise tax. The

Court upheld a corporation tax on a domestic corporation measured by the entire value of its paid-up capital stock. (The *Beatrice Creamery Co.* case was dismissed in the United States Supreme Court for want of substantial federal question, *supra*.)

b. Brandeis, J. in the *Cream of Wheat* case (*supra*) expressed this Court's willingness to look beyond the state's labels:

"The company concedes that the State of North Dakota might constitutionally have imposed a franchise tax upon a corporation organized under its laws, even though it had no property within the state. The contentions are that the supreme court of North Dakota erred in holding that the tax here in question was a franchise tax; that it was in reality a property tax upon intangible property; that the company's intangible property must be deemed to have been located where its tangible property was; and that in taxing property beyond its limits North Dakota violated rights guaranteed by the 14th Amendment. The view which we take of the matter renders it unnecessary to consider the question whether or not the law under discussion imposed a franchise tax or a property tax. Compare *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632 . . ." (Emphasis supplied.) *Id.* at 328)

c. In *Grega Dyeing Co. v. Query*, 286 U.S. 472 (1932), Hughes, C. J., in an opinion of the Court, went further and viewed the taxing or regulatory scheme in its entirety:

"In maintaining rights asserted under the Federal Constitution, the decision of this Court is not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court. We regard the substance rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the state. [Citations omitted.]

"The state court answered the contention as to discrimination against interstate commerce by referring to other statutes of the State imposing a tax upon the sale and use of gasoline within the State. The state court said that the Act in question 'taxes all gasoline stored for use and consumption upon which a like tax has not been paid under other statutes. By the kindred Acts all users are taxed.' But appellants question the right to invoke other statutes to support the validity of the Act assailed. To stand the test of constitutionality, they say, the Act must be constitutional 'within its four corners,' that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power. . . .

"Reading together the statutes with respect to gasoline taxes, the state court took the view that as to the gasoline tax with respect to sales within the State, the burden actually rests on the consumer, although not placed upon the consumer directly. No reason is found to challenge this view. . . . With respect, then, to the gasoline used by appellants in their business, there is in this aspect no discrimination against them because their gasoline has its origin in another state, as others either buying or producing gasoline within the state pay the tax at the same rate in relation to their consumption.

"Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries. [Citing cases.] . . . Appellants had the burden of showing an injurious discrimination against them because they bought their gasoline outside the state. This burden they have not sustained. They have failed to show that whatever distinction



there existed in form there was any substantial discrimination in fact. . . ." (Emphasis supplied.) (*id.*, at 476-482)

#### (4) ESCHEAT CASES

The *Western Union* case, *supra*, together with its predecessors, *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951), and *Connecticut Life Ins. Co. v. Moore*, 333 U.S. 541 (1948), represent perhaps this Court's most recent treatment of this type of problem.

# INDEX OF AUTHORITIES

	Pages
Allgeyer v. Louisiana, 165 U.S. 578 (1896)	3
Compania General De Tabacos De Filipinas v. Collector of Internal Revenue, 275 U.S. 87 (1927)	4
Connecticut Life Ins. Co. v. Moore, 333 U.S. 541 (1948)	A-4
Cream of Wheat Co. v. County of Grandforks, 253 U.S. 325 (1920)	A-1, A-2
Empresa Siderurgica v. County of Merced, 337 U.S. 154 (1949)	A-1
Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932)	A-2
Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632	A-2
Minnesota v. Blasius, 290 U.S. 1 (1933)	A-1
Nebraska ex rel. Beatrice Creamery Co. v. Marsh, 282 U.S. 799 (1930)	A-1, A-2
St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346 (1922)	4
Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951)	A-4
State ex rel Beatrice Creamery Co. v. Marsh, 119 Neb. 197, 277 N.W. 926 (1929)	A-1
Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953)	4
Western Union Telegraph Co. v. Pennsylvania, 30 U.S.L. Week 4037 (U.S. Dec. 4, 1961)	2, A-4
Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936)	A-1

Office-Supreme Court, U.S.  
**FILED**

JAN 20 1962

JOHN F. DAVIS, CLERK

No. 144

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1961

STATE BOARD OF INSURANCE, ET AL.,  
*Petitioners,*

v.

TODD SHIPYARDS CORPORATION,  
*Respondent.*

*On Writ of Certiorari to the Court of Civil Appeals  
of Texas, Third Supreme Judicial District,  
Sitting in Austin, Texas*

**BRIEF FOR THE PETITIONERS**

**WILL WILSON**  
Attorney General of Texas

**FRED B. WERKENTHIN**  
Assistant Attorney General

**BOB E. SHANNON**  
Assistant Attorney General

**COLEMAN GAY, III**  
Assistant Attorney General

Counsel for Petitioners  
Capitol Station  
Austin 11, Texas

## SUBJECT INDEX

Index of Authorities .....	ii
Opinion Below .....	1
Jurisdiction .....	2
Question Presented .....	2
Statute Involved .....	2
Statement .....	3
Factual Summary .....	6
Argument .....	7
Whether Texas Is Prohibited By The Due Process Clause Of The Fourteenth Amend- ment Of The United States Constitution From Taxing Insurance Premiums Paid By Persons Insuring Texas Risks On Insurance Policies Contracted For In New York .....	7
Certificate of Service .....	18

## INDEX OF AUTHORITIES

Cases:	<i>Pages</i>
Alaska Packers Ass'n v. Industrial Accident Comm. of California, et al, 294 U.S. 532 (1935).....	11
Allgeyer v. Louisiana, 165 U.S. 528 (1896) .....	3, 7, 17
Great Atlantic and Pacific Tea Co. v. Grosgean, 301 U.S. 412 (1937) .....	10
Hoopesten v. Cullen, 318 U.S. 313 (1942) .....	7, 10, 11, 16
Osborn v. Ozlin 310 U. S. 53 (1940) .....	7, 10, 15, 16
St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 347 (1922) .....	3, 7
Travelers Health Assoc. v. Virginia, 339 U.S. 643 (1950) .....	7, 10, 16
Watson v. Employers Liability Corp., 348 U.S. 66 (1956) .....	7, 10, 12, 16
Statutes:	
Texas Insurance Code, Vol. 14, Vernon's Annotated Civil Statutes, pp. XXIII-LIX .....	9
Texas Insurance Code, Vol. 14, Vernon's Annotated Civil Statutes:	
Article 1.10 .....	9
Article 1.15 .....	9
Article 2.02 .....	9
Article 2.10 .....	9
Article 5.24 .....	15
Article 5.25 .....	14
Article 5.33 .....	14
Article 5.41 .....	14
Article 5.68 .....	15

Statutes, Cont :	<i>Pages</i>
Article 6.09	9
Article 6.11	9
Article 8.07	9
Article 21.38	7, 8, 9
Article 21.38, Section 1	8
Article 21.38, Section 2(a)	8, 14
Article 21.38, Section 2(b)	8, 14
Article 21.38, Section 2(c)	8, 14
Article 21.38, Section 2(d)	14
Article 21.38, Section 2(e)	2, 3, 7, 8, 10, 14, 15, 16
Chapter 5	9
Article 7064, Vernon's Annotated Civil Statutes	15
28 U.S.C., §1257(3)	2
McCarran Act, 15 U.S.C.A., § 1011-1015	3

NO. 144

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1961

---

STATE BOARD OF INSURANCE, ET AL.,  
*Petitioners,*

v.

TODD SHIPYARDS CORPORATION,  
*Respondent.*

---

*On Writ of Certiorari to the Court of Civil Appeals  
of Texas, Third Supreme Judicial District,  
Sitting in Austin, Texas*

---

**BRIEF FOR THE PETITIONERS**

The petitioners file this brief, and ask that the Court consider, in addition to this brief, the petitioners' Petition for Writ for Certiorari.

**OPINION BELOW**

The opinion of the District Court is unreported, and the judgment is printed in Appendix "B" in petitioners' Petition for Writ of Certiorari, pp. B-1—B-4. The opinion of the Court of Civil Appeals, printed in Appendix "C" in petitioners' Petition for Writ of Certiorari, pp. C-1—C-12, is reported in 340 S. W. 2d 339. The opinion of the Supreme Court of Texas in refusing to grant the petitioners' application for writ of error,



printed in Appendix "D" in petitioners' Petition for Writ of Certiorari, p. D-1, is reported in 343 S. W. 2d 241.

## **JURISDICTION**

The judgment of the Court of Civil Appeals was entered on November 16, 1960. Rehearing was denied on November 23, 1960. The judgment of the Supreme Court of Texas refusing to grant the petitioners' application for writ of error was entered on February 8, 1961. Rehearing on petitioners' application for writ of error was refused on March 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., §1257(3). This Court granted the Petition for Writ of Certiorari on October 9, 1961.

## **QUESTION PRESENTED**

Whether Texas is prohibited by the Due Process Clause of the Fourteenth Amendment of the United States Constitution from taxing insurance premiums paid by persons insuring Texas risks on insurance policies contracted for in New York.

## **STATUTE INVOLVED**

The statutory provision involved is Section 2(e) of Article 21.38 of the Texas Insurance Code, Vol. 14, Vernon's Annotated Civil Statutes:

"If any person, firm, association or corporation shall purchase from an insurer not licensed in the State of Texas a policy of insurance covering risks within this State in a manner other than through an insurance agent licensed as such under the laws of the State of Texas, such person, firm, association or corporation shall pay to the Board a tax of five per cent (5%) of the amount of the gross premiums paid by such insured for such insurance. Such tax shall be paid not later than thirty (30) days from the date on which such premium is paid to the unlicensed insurer."

## STATEMENT

The facts were largely stipulated in the trial court, and will be here briefly summarized.

Article 21.38 of the Texas Insurance Code deals with the placing of insurance with unauthorized insurers. An "unauthorized insurer" is an insurance company not licensed to do business in Texas. Subsection (e) of Section 2 of that Article levies a 5% tax on the gross premiums paid by a purchaser of insurance covering risks located within Texas from an unauthorized insurer. Section 1 of Article 21.38 specifically states that its enactment is pursuant to the powers and privileges conferred upon the State by the McCarran Act, 15 U.S.C.A., § §1011-1015.

The respondent paid to the Comptroller of the State of Texas the tax levied by Section 2(e) of Article 21.38 of the Texas Insurance Code, under protest. Then the respondent filed suit in the 53rd District Court of Travis County, Texas, to recover the taxes paid, alleging that the tax was unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The trial court found the tax invalid as a violation of due process. On appeal, the Court of Civil Appeals, Third Supreme Judicial District, sustained the holding of the trial court upon the authority of *Allgeyer v. Louisiana*, 165 U.S. 528, (1896), and *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 347 (1922). The Supreme Court of Texas refused the petitioners' application for writ of error, and its subsequent motion for rehearing, upon the authority of *Allgeyer v. Louisiana*, *supra*, and *St. Louis Cotton Compress Co. v. Arkansas*, *supra*.

The respondent is a New York corporation, licensed to do business in Texas, and, since 1934, has owned properties located at Galveston and Houston, Texas, of a

value exceeding \$900,000.00 Approximately twenty-seven per cent (27%) of the respondent's volume of business is done in Texas, where it employs in the neighborhood of 1,500 persons. The principal activity of the respondent's Texas plants is the repair, conversion, and construction of ships, as well as the manufacture of industrial equipment and oil burners.

For protection of the respondent's property located in Texas, and for protection against risks arising out of the use of that property, the respondent purchases several types of insurance agreements, including:

(1) Industrial work property damage insurance (a liability insurance covering damage to property belonging to others undergoing repairs by the respondent);

(2) Builder's risk insurance (a liability insurance on vessels while undergoing repair or construction);

(3) Dry dock insurance (casualty insurance covering risks of dry docks);

(4) Pier and bulkhead collision insurance (casualty insurance covering damage to the piers and bulkheads caused by collision, flood, etc.);

(5) Product liability insurance, to the extent of the excess portion of that insurance (liability insurance covering claims for personal injury or property damage).

The respondent purchased this insurance from the Lloyds of London and The Institute of London Underwriters. Only insurance of these two companies is involved here, and each of these companies is domiciled in England. The respondent has purchased these types of insurance since 1934. This insurance was purchased for the respondent from the insurers by several New York and Canadian insurance brokers. None of these brokers is an insurance agent licensed under the laws of the State of Texas. The policies of insurance in question are

signed and issued by the insurers in England, and it is stated in the policies that the place of physical and actual issue and delivery of the policy is England, but, as between the insured and the insurer, the place of issuance may be considered New York City.

Neither of the insurers has a permit to write insurance in Texas, neither do they submit any statements of their condition to the State Board of Insurance, nor are the affairs of either in any way subject to examination by the Texas State Board of Insurance, nor does the State Board of Insurance have any control or supervision over their affairs. Neither of the insurers has an office or agent in the State of Texas. Neither insurer conducts any investigation of Texas claims in Texas; the adjustment of losses is handled between the respondent's agent in the New York office and the agent of the insurers in New York City. Neither of the insurers solicits the respondent's insurance business or policies within the State of Texas.

The Texas plants of the respondent do not correspond or conduct any negotiations with the insurers, but all negotiations are handled by the respondent's agent, in New York City, with the brokers of the insurer or directly with the London office. All decisions relative to the purchase of insurance and renewal of insurance, the extent and amount of coverage, the selection of insurers, and confirmation of insurance contracts are made at the respondent's New York office.

In the case of the builder's risk insurance, the Texas office of the respondent notifies the New York office that the respondent's Texas office has entered into a construction or repair contract. The New York office then applies to one of the New York insurance brokers for builder's risk insurance coverage on that particular vessel or contract; this application letter is signed by an officer of the New York office, but the coverage is re-

quested in the name of the Texas division and identifies Texas as the place where the work is to be performed.

When a loss occurs at the Texas plants of the respondent, that plant informs the New York office. The New York office then notifies the brokerage house that negotiated the insurance; the broker in turn appoints the London Salvage Association to prepare an estimate or "survey" of the loss. In some instances, the respondent's New York office notifies the London Salvage Association that a survey is requested. The Texas plant also appraises the amount of the loss. After appraisal, the London Salvage Association forwards its estimate or survey to the respondent's New York office, and the respondent then submits the survey to the particular insurance broker to be used in adjusting the amount of the loss. The Texas plant assists the London Salvage Association in arriving at a fair figure for the loss. The London Salvage Association issues a bill to the respondent for the London Salvage Association's services, and such a bill is paid in New York City by the respondent.

The adjusting of the loss is carried on by Lloyds through the insurance broker and the New York office. The insurance broker submits its adjustment figure and recommendation to the insurers for final approval. After the figure and adjustment of loss is approved, the New York office is notified by the insurance broker or the underwriter, and the New York office then notifies the Texas plants that the claim will or will not be paid.

### FACTUAL SUMMARY

From a reading of the above statements, these factors appear:

- (1) Todd is a foreign corporation, licensed to do business in Texas.
- (2) The property insured by Todd is located in Texas.
- (3) Todd purchased insurance on such property

with an insurance company not licensed to do business in Texas other than through a duly licensed agent.

The facts of this case come within the terms of Article 21.38, Section 2(e), Texas Insurance Code, and the only issue raised is the constitutionality of that provision.

## ARGUMENT

**WHETHER TEXAS IS PROHIBITED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION FROM TAXING INSURANCE PREMIUMS PAID BY PERSONS INSURING TEXAS RISKS ON INSURANCE POLICIES CONTRACTED FOR IN NEW YORK.**

Despite the fulminations of the respondent to the contrary, there is little doubt but that this Court has cast aside the conceptualistic formulas of the *Allgeyer v. Louisiana*, 165 U.S. 528 (1896), and *St. Louis Cotton Compress Company v. Arkansas*, 260 U.S. 347 (1922), cases to decide a case of this nature. The Court now decides this kind of case according to the principles set out in *Osborn v. Ozlin*, 310 U.S. 53 (1940), *Hoopeston v. Cullen*, 318 U.S. 313 (1942), *Travelers Health Assoc. v. Virginia*, 339 U.S. 643 (1950), and *Watson v. Employers Liability Corp.*, 348 U.S. 66 (1956). These cases establish that the power of state regulation is no longer pretermitted by a conceptualistic test of the place of making a contract, but rather the test is one of determining the degree of interest in the insurance contracts by the regulating state. This argument is fully developed in the petitioners' petition for certiorari at pages 5-10, and will not be repeated here.

At this point, it becomes necessary to examine Article 21.38, its purpose and effect. The primary purpose of Article 21.38 is to regulate the placing of insurance

by resident insureds with unauthorized insurers on risks located in Texas. That purpose appears in Section 1, "The Legislature declares that it is the subject of concern that the placing of such direct line of insurance with unauthorized insurers is not properly regulated. . . ." This regulation is effected by a tax levied upon insureds purchasing insurance from unauthorized insurers on Texas risks.

Subsections (a), (b), and (c) of Section 2 provide for licensing of agents to sell insurance of unauthorized companies to insurers who are unable to secure from licensed companies the full amount of coverage necessary for a particular risk. The agent pays a five per cent (5%) tax on the gross premiums paid for such insurance placed through him in unauthorized insurers.

In 1957, subsection (e), the constitutionality of which is questioned in this lawsuit, was added to Section 2 and provided that if an insured purchased insurance from an unauthorized company other than through a licensed agent the insured must pay a five per cent (5%) tax of the gross premiums so paid.

Subsection (e) is concerned with the owners of Texas risks purchasing insurance from unauthorized insurers. And it confines itself to unauthorized insurers, i.e., insurers who are not licensed to do business in Texas, which could be insurance companies incorporated in other countries, those incorporated in other states in this country, or those incorporated in this State but which have not complied with the Texas law. Subsection (e) levies a tax upon the insured buying insurance for property or risks in Texas, so it is apparent that the tax is *not* placed on the *unauthorized insurer*.

What is the regulatory effect of the tax? Before this question can be answered adequately, it is necessary to briefly examine the background of insurance regulation in Texas and its general purposes.



The pre-regulated era in Texas insurance history is unfortunately well known. See Texas Insurance Code, Vol. 14, Vernon's Annotated Civil Statutes, pp. XXIII-LIX. At that time, many foreign and domestic companies used every technical device and, at times, resorted to trickery and fraud to defeat paying bona fide claims. Most insurance companies were under-financed, causing frequent failures. There also existed discriminatory rate practices, especially in fire insurance.

In 1876, the Legislature created a Department of Insurance and over the years has greatly increased its authority over the insurance business. Presently, the State Board of Insurance, as it is now called, is charged with the enforcement of laws and promulgation of policy which comprehend practically every phase of the insurance business. Illustrative of the requirements of the Texas Insurance Code are the following: the maintenance of minimum capital and minimum surplus, Article 2.02; that annual financial statements be submitted to the State Board of Insurance, Article 6.11, Article 8.07, etc.; that examinations be made of insurance companies doing business in Texas, Article 1.15; that certain reserves be maintained, Article 1.10; that high caliber investments be maintained, Article 2.10; that policy forms be approved by the State Board of Insurance, Chapter 5; that the insurance companies file a bond conditioned that the company will pay its lawful obligations, Article 6.09; and that in certain types of insurance the State Board of Insurance set rates, Chapter 5.

Although prior to the enactment of Article 21.38 the Legislature had enacted comprehensive measures designed to regulate, control, and supervise the insurance business so as to protect resident insureds, the problem of unauthorized insurers remained to be solved. These unauthorized insurers sold insurance to the owners of risks located in Texas, and these insurers in no way were regulated by the State Insurance Department.

Such a hiatus severely weakened the State regulatory scheme. The worth of such a policy varied with the solvency of the unauthorized company. Some of the unauthorized companies were, and are, subjected to little or no state regulation or supervision. As long as this hiatus existed, the effectiveness of the Texas regulatory program was crippled.

Then, returning to the question, what is the regulatory effect of the tax levied by subsection (e), the simple effect of the tax is to reduce the number of owners of Texas risks who purchase insurance from unauthorized companies by making it more expensive to do business with unauthorized insurance companies. Subsection (e) does not forbid owners of property or risks to place insurance with unauthorized companies, but requires those who do so to pay a five per cent (5%) tax on the gross premiums. The Legislature has determined by various laws that Texas risks can be best protected by insuring those with controlled and supervised insurance companies, i.e., authorized companies. Subsection (e) attempts to accomplish this end by means of a tax. It has long been recognized that taxation may be made the implement of the exercise of the State's police power. See *Great Atlantic and Pacific Tea Co. v. Grosgean*, 301 U.S. 412 (1937).

Since the validity of subsection (e) must be determined by the degree of interest of Texas in the insurance contracts, it is then important to examine the interest of Texas in this insurance, *Osborn v. Ozlin*, *supra*, *Hoopes-ton v. Cullen*, *supra*, *Travelers Health Assoc. v. Virginia*, *supra*, and *Watson v. Employers Liability Corp.*, *supra*.

It is at once apparent that this interest is substantial. Most important in these considerations is the fact that the insured respondent is a Texas resident and the property and risks insured are physically located in Texas. The respondent began its operations at Galveston and

Houston in 1934 and has invested over \$900,000.00 in its plants and equipment in Texas. The states have long exercised powers over property located within their respective jurisdictions, *Hoopeson v. Cullen*.<sup>1</sup>

The inability or failure of the unauthorized insurance company to pay large casualty losses of the insured could cause catastrophic economic consequences in the Galveston and Houston areas. The labor force of the respondent of some 1,500 persons would be unemployed. Until re-employed the State would be called upon to provide relief for these people. *Alaska Packers Ass'n v. Industrial Accident Comm. of California, et al*, 294 U.S. 532 (1935).<sup>2</sup> The loss of the purchasing power of this group would affect adversely the local business community. Both the

---

"A state may make flood control, quarantine, conservation and zoning regulations affecting the property within its bounds. It is a source of law for the forms of conveyances, the nature of covenants, future interest and easements, for the construction of wills, trusts and mortgages, and for many other legal principles affecting property interests. Contracts made in other states may remain subject to the law of the state of the situs of the property, particularly in respect to immovables. *There is no more reason to bar the state from authority over the insurance of the property within it than to exclude it from control of all the property interests mentioned.*" *id*, at page 318 (Emphasis added.)

<sup>2</sup> (at page 542) "The meagre facts disclosed by the record suggest a practice of employing workers in California for seasonal occupation in Alaska, under such conditions as to make it improbable that the employees injured in the course of their employment in Alaska would be able to apply for compensation there. It was necessary for them to return to California in order to receive their full wages. They would be accompanied by their fellow workers, who would normally be the witnesses required to establish the fact of the injury and its nature. The probability is slight that injured workmen, once returned to California, would be able to retrace their steps to Alaska, and there successfully prosecute their claims for compensation. *Without a remedy in California, they would be remediless, and there was the danger that they might become public charges, both matters of grave public concern to the state.*" (Emphasis added.)

sales and ad valorem tax collections would be reduced. Presumably, the paucity of facilities like that of the respondent would adversely affect the volume of maritime activity at Galveston and Houston, with widespread deleterious economic consequences to the whole community.

THE events which give rise to the contractual obligations of the unauthorized insurance company to pay on policies will occur in Texas, and Texas provides the judicial machinery for the adjudication of these rights. Texas or its instrumentalities extend police protection to the insured property, and, especially in cases of losses by the insured, the State will be called upon for additional police protection. The State and its instrumentalities provide an orderly frame within which the respondent may conduct its affairs as well as provide services essential to its economic well-being, such as street, harbor, and channel construction and maintenance.

In case of some of the insurance involved, persons compensated will be residents of Texas, and upon them will be placed the task of bringing suit in the event the unauthorized insurer denies the risk. These people will be treated in Texas hospitals by Texas doctors. As they may be destitute, they may be compelled to call upon individuals or the State for aid. *Watson v. Employers Liability Corp.*, *supra*.<sup>3</sup> These persons will more than

---

<sup>3</sup> (at page 72) "Louisiana's direct action statute is not a mere intermeddling in affairs beyond her boundaries which are no concern of hers. Persons injured or killed in Louisiana are most likely to be Louisiana residents, and even if not, Louisiana may have to care for them. Serious injuries may require treatment in Louisiana homes or hospitals by Louisiana doctors. The injured may be destitute. They may be compelled to call upon friends, relatives, or the public for help. Louisiana has manifested its natural interest in the injured by providing remedies for recovery of damages. It has a similar interest in policies of insurance which are designed to assure ultimate payment of such damages. Moreover, Louisiana courts in most instances pro-

likely resort to Texas courts, and, unless they do, they will have to resort to distant forums at great trouble and expense.

Texas has a vital interest in the effective enforcement of the laws regulating insurance on risks located in Texas. As noted by the Court of Civil Appeals, below, the insurance business has become rigidly regulated by the State to control the irresponsibility of the insurance business. This was done to protect the owners of Texas risks from investing in contracts of insurance of companies which had not established their responsibility, financially or otherwise. However, many Texas residents were not protected by the regulatory laws of the State since they were sold insurance on Texas risks from insurance companies not submitting to the regulatory supervision of the State. Such unauthorized companies in no way subjected themselves to the supervision and control of the State Board of Insurance. As long as this gap existed, the protection afforded by the State to its residents by its regulatory insurance program was limited.

A part of the Texas regulatory scheme is fixing of fire insurance rates by the State Board of Insurance. The rate of a particular area is determined in part by the loss experience reported to the State Board of Insurance. If, over a period of time, there has been no fire

---

vide the most convenient forum for trial of these cases. But modern transportation and business methods have made it more difficult to serve process on wrongdoers who live or do business in other states. In this case efforts to serve the Gillette Company were answered by a motion to dismiss on the ground that Gillette had no Louisiana agent on whom process could be served. If this motion is granted, Mrs. Watson, but for the direct action law, could not get her case tried without going to Massachusetts or Illinois although she lives in Louisiana and her claim is for injuries from a product bought and used there. What has been said is enough to show Louisiana's legitimate interest in safeguarding the rights of persons injured there. . . ."

experience, the rate of the area is credited. However, an unauthorized insurer does not report its experience, and, consequently, within a given area, the fire rates may be entirely too low for the actual experience of the community. The rate for individual risks may be reduced by the State Board of Insurance if the hazards surrounding the risk are reduced by the insured. Such reduction in rates provides an incentive to reduce fire hazards, which acts for the community good. However, the State Board of Insurance has no authority to reduce the rates of unauthorized insurers, and, thus, if the insurer will not voluntarily reduce its rates, the insured will have no incentive to reduce its fire hazards. (See Articles 5.25 and 5.33 which clearly point out that one of the purposes of rate regulation in Texas is to encourage the reduction of the hazards of fire).

One of the purposes of fire insurance rate regulation is to prevent discrimination in rates by insurers as between insureds. See Article 5.41, Texas Insurance Code. Certainly, the insuring with unauthorized companies of Texas risks thwarts the intent of the statute since the unauthorized insurer may vary its rate among similarly situated insureds as much as it pleases.

Prior to subsection (e) of Section 2, subsections (a), (b), (c), and (d) of Section 2, Article 21.38 provided at least a measure of control over unauthorized insurers placing insurance in this State. The licensed agent was required to report to the State Board each sale of unauthorized insurance. In this manner, the State Board was kept apprised of the unauthorized insurance in Texas, and could at least circulate information over the State about the reliability of the unauthorized insurer concerned. However, most of the insureds who obtained insurance with unauthorized insurers did not bother to buy this insurance through licensed agents. To help secure compliance with subsections (a), (b), (c), and (d), the

Legislature enacted subsection (c). See *Osborn v. Ozlin*, 310 U.S. 53 (1940), p. 63.

Another vital interest of Texas is that as the regulation of insurance in Texas is designed to protect persons buying insurance on risks within Texas, it is proper that all of these risks share equally the cost of this regulation. The tax levied by Article 21.38, Section 2(e), was enacted to equalize the tax burden born by Texas risks.<sup>4</sup> Before the enactment of Section 2(e), authorized insurance companies paid the entire tax load for the regulatory supervision of the insurance industry in Texas as a consequence of insuring Texas risks, while the Texas risks insured against by unauthorized insurance companies escaped from paying any taxes. If Section 2(e) is invalidated, the authorized insurance companies will once again shoulder the entire burden of paying for the regulation of insurance in Texas. And again the temptation would be strong for companies, now submitting to the supervision and control of the State Board of Insurance, to abandon compliance with Texas law and begin underground insurance writing outside the State, as unauthorized insurers.

More than the interests of Texas and the respondent are involved here. The whole future of state regulation of the insurance business hangs in the balance. Some twenty-two states have provisions similar to that of

---

<sup>4</sup>Article 7064, Vernon's Annotated Civil Statutes, levies a 3.85% premium tax on all authorized insurance companies in addition to the various maintenance taxes: The Fire Insurance Maintenance Tax (Art. 5.49, Texas Insurance Code); The Casualty Insurance Maintenance Tax (Art. 5.24, Texas Insurance Code); and the Workmen's Compensation Insurance Comm. Tax. (Art. 5.68, Texas Insurance Code). [The above cited Articles appear in Vol. 14, Vernon's Annotated Civil Statutes.] These taxes alone aggregate 5% or more of the gross premiums, the amount levied by Section 2(e), charged and do not take in account various agency fees and filing fees paid by authorized insurers.



Texas. See Appendix "E" of Petition for Writ of Certiorari. Some insureds, like the respondent, already purchase insurance from unauthorized insurers while literally hundreds of other large, multi-state insureds are waiting in the wings to see whether subsection (e) fails. If it does, they will shift their insurance to unauthorized companies. The companies now licensed in Texas will not be blind to the fact that it would no longer be necessary to submit to Texas regulation to secure Texas business, and the State will witness an exodus of insurance companies. Then the bulk of the insureds purchasing insurance from the regulated companies will be those too small and uninformed to purchase from unauthorized insurers. On these insureds will ultimately fall most of the cost of regulation of insurance. Also, many of the very largest risks will be insured in companies over which the State has utterly no control.

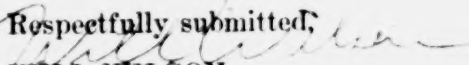
Respondent may argue that State protection is unnecessary for large multi-state insureds who are in a position to protect their own interests; however, if the loophole is open, then small insureds not able to protect themselves will also purchase unauthorized insurance. The regulatory scheme as a whole is well-suited to protect against these evils as pointed out in the *Osborn* case. Here, as in *Osborn v. Ozlin*, this legislation is not to be judged by abstracting these insurance contracts written in New York from the organic whole of the insurance business, the effect of that business on Texas, and Texas' regulation of it.

The petitioners submit that these interests of Texas in the insurance contracts involved here are every bit as substantial, or more substantial, than those involved in *Osborn v. Ozlin*, *Hoopeston v. Cullen*, *Travelers Health Association v. Virginia*, and *Watson v. Employers Liability Corp.*, *supra*.

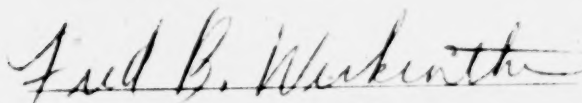
In conclusion, the petitioners submit that the Court

of Civil Appeals, below, was in error in resolving this case by a due process philosophy, *Allgeyer v. Louisiana*, which has been deliberately discarded by the United States Supreme Court.

Respectfully submitted,

  
WILL WILSON

Attorney General of Texas



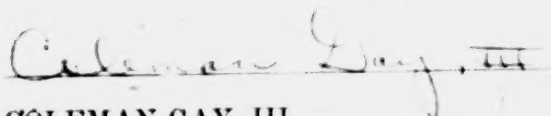
FRED B. WERKENTHIN

Assistant Attorney General



BOB E. SHANNON

Assistant Attorney General



COLEMAN GAY, III

Assistant Attorney General

Counsel for Petitioners,  
State Board of Insurance, et al.

Capitol Station  
Austin 11, Texas

## **CERTIFICATE OF SERVICE**

A copy of this Brief for the Petitioners has been served pursuant to Supreme Court Rule No. 33 by depositing a copy of the Brief in a United States Mail Box, with first class postage prepaid, addressed to counsel of record for the Respondent at his Post Office Address, 510 Gulf Building, Houston 2, Texas.

*Bob E. Shannon*  
**BOB E. SHANNON**

FEB 15 1962

---

NO. 144

---

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1961

---

STATE BOARD OF INSURANCE, ET AL., *Petitioners*

v.

TODD SHIPYARDS CORPORATION, *Respondent*

---

On Writ of Certiorari to the Court of Civil Appeals  
of Texas, Third Supreme Judicial District, Sitting  
in Austin, Texas

---

**BRIEF FOR THE RESPONDENT**

---

Of Counsel:

CULLEN and DYKMAN  
Brooklyn, New York

LIDDELL, AUSTIN, DAWSON  
& SAPP  
Houston 2, Texas

HARRY G. HILL  
177 Montague St.  
Brooklyn, New York

FRANK A. LIDDELL  
CHARLES R. VICKERY, JR.  
510 Gulf Building  
Houston 2, Texas

## SUBJECT INDEX

	PAGE
STATEMENT OF THE CASE	1
1. The Taxable Event Is The "Purchase" And The Premium Payment	2
2. The Tax Discriminates Against Unadmitted Insurers In Favor Of Texas Insurers	4
3. No "Minimal Contact" Or "Nexus" Exists	8
A. The New York Nexus	8
B. The Claimed Texas Nexus	11
4. The Unadmitted Insurance Tax Is An Occupation Tax And Not A Regulation	12
5. Respondent's Domicile Is New York	14
6. Respondent Has Paid All Taxes Required For The Privilege Of Doing Business In Texas	15
7. The Insurers Do Not Do Business In Texas	15
8. The Trial Court's Constitutional Holding Is Not Limited To Due Process	16
9. The Tax Applies Without Regard To Availability In Texas	16
QUESTIONS PRESENTED	17
(1) Is The Texas Unadmitted Insurance Tax Levied On Respondent's New York Contracts And Premium Payments Unconstitutional Under The Due Process Clause Of The U. S. Constitution's Fourteenth Amendment As Held By The Texas Courts On The Authority Of <i>St. Louis Cotton Compress Co. v. State Of Arkansas</i> , 260 U.S. 346? Since Petitioner Does Not Distinguish <i>St. Louis Compress</i> , The Threshold Question Is Simply, "Should <i>St. Louis Cotton Compress</i> Be Overruled?"	17
(2) Should This Court Follow The Law Established And Followed Since 1896 In <i>Allgeyer</i> , <i>St. Louis Compress</i> , <i>Compania General De Tabaco</i> , <i>De Filipinas</i> , And <i>Connecticut General Life Insurance Company</i> , Because Respondent's Business And The Business Of Insurance Have Been "Left For 65 Years To Develop, On The Understanding" That Respondent Was Not Obligated To Pay The Challenged Tax?	17

	PAGE
(3) Is The Arbitrary Discrimination Against Unadmitted Insurers And In Favor Of Texas Insurers Embodied In The Tax Unconstitutional Under The Equal Protection Clause Of The U. S. Constitution's Fourteenth Amendment?	17
(4) Does The Court Have Jurisdiction When The Texas Supreme Court May Have Rested Its Judgment Upon An Adequate State Ground?	17
SUMMARY OF ARGUMENT	18
ARGUMENT:	
1. DUE PROCESS ARGUMENT	20
A. The Tax Is Condemned By The <i>St. Louis Cotton Compress Co. v. Arkansas</i> , 260 U.S. 346, Line Of Cases	20
B. <i>St. Louis Compress</i> And Its Progeny Should Not Be Overruled	24
C. <i>St. Louis Compress</i> Is Not Dormant Authority	30
D. Texas Does Not Have The "Nexus" Required To Obtain Jurisdiction To Tax Respondent's New York Contracts And Premium Payments	30
E. Petitioner's Jurisdiction To Tax Is Not Determined By Discrimination	34
F. The Tax Is Not Levied On Losses, But The Losses, If Occurring, Are Adjusted And Paid In New York	35
G. The Tax Is Not In Return For Respondent's Privilege To Do Business In Texas	36
H. The Nexus Must Relate To The "Taxable Event"	36
I. The Notification Of Respondent's New York Office Of The Making Of Ship Repair Contracts Is Not A Sufficient Nexus Of The Builder's Risk Insurance	36
J. The State's Power To Control The Objects Of The Tax Mark The Boundary Of The State's Jurisdiction To Tax	37
2. EQUAL PROTECTION ARGUMENT	38
A. The Rate Discrimination And Intention To Discriminate Against Unadmitted Insurers Is Plain	39
B. Equal Protection Condemns The State's Attempt To Favor Domestic Insurers And Discriminate Against Foreign Insurers	40

### III.

#### C. The Exemption Of Domestic Insurers From The Tax Denies Equal Protection

#### 3. THE JURISDICTION QUESTION

#### CONCLUSION

#### CERTIFICATE OF SERVICE.

## LIST OF AUTHORITIES

### CASES

- Agnew v. Coleman County Electric Coop., 153 Tex. 587,  
272 S.W.2d 877
- Allgeyer v. Louisiana, 165 U.S. 578 17, 18, 20, 21, 25, 32
- Allied Stores of Ohio v. Bowers, 358 U.S. 522
- Bridges v. City of Richardson, —Tex.—, —S.W. 2d— (decided  
Jan. 31, 1962)
- Case of the State Tax on Foreign-Held Bonds, 82 U.S. 300
- Central Hanover Bank & Trust Company v. Kelly, 319 U.S.  
91 2
- Compania General De Tabacos De Filipinas v. Collector of  
Internal Revenue, 275 U.S. 87 2, 17, 20, 21, 22, 25, 31, 32, 33
- Connecticut General Life Insurance Company v. Johnson,  
393 U.S. 77 12, 18, 20, 22, 23, 24, 30, 31, 32
- Durley v. Mayo, 351 U.S. 277 1
- Federal Trade Commission v. Travelers Health Association,  
362 U.S. 293 18, 2
- Hanover Fire Insurance Co. v. Carr, 272 U.S. 494 19, 40, 41
- Hoopston Canning Co. v. Cullen, 318 U.S. 313 77
- Kansas City Title Insurance Co. v. Butler, 253 S.W.2d 315  
(Ref. N.R.E.)
- Kirtland v. Hotchkiss, 100 U.S. 491
- McLeod v. Dilworth, 322 U.S. 327
- Morey v. Doud, 354 U.S. 457 1
- Northern Central Railway Co. v. Jackson, 74 U.S. 262
- Osborn v. Ozlin, 310 U.S. 53 2
- Phillips Chemical Co. v. Dumas Independent School Dis-  
trict, 361 U.S. 376
- St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346  
13, 17, 18, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30,  
32, 34, 35, 45, 46
- Stembridge v. Georgia, 343 U.S. 541



# IV

## CASES

## PAGE

Texas Osage Cooperative Royalty Pool v. Clark, 159 Tex. 141, 322 S.W.2d 506	45
Toolson v. New York Yankees, Inc., 346 U.S. 356	18, 26, 27, 28
Travelers Health Association v. Virginia, 339 U.S. 643	12, 25
United States v. Southeastern Underwriters Association, 322 U.S. 533	27
Watson v. Employers Liability Assurance Corporation, 348 U.S. 66	26
Wheeling Steel Corporation v. Glander, 337 U.S. 562	19, 40, 41

## CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment, Section 1	17, 45
---------------------------------	--------

## CONSTITUTION OF TEXAS

Article I, Section 19	44, 45
Article VII, Section 3	13
Article VIII, Sections 1 and 2	45

## TEXAS STATUTES

Article 7064, V.A.C.S.	5, 6, 8, 35
Laws of the 55th Legislature, Regular Session, Chapter 395, Section 7	13

## TEXAS RULES OF CIVIL PROCEDURE

Rule 483	45, 46
----------	--------

## TEXAS INSURANCE CODE

Article 5.24	7
Article 5.49	7
Article 21.38	45
Article 21.38 (2)(c)	6, 30, 34, 39
Article 21.38 (2)(d)	6, 14, 16
Article 21.38 (2)(e)	2, 6, 14, 16, 19, 29, 30, 34, 35, 41

## MISCELLANEOUS

House Report No. 143, 79th Congress, 1st Sess. 3	28
--	----

NO. 144

---

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1961

---

STATE BOARD OF INSURANCE, ET AL., *Petitioners*

v.

TODD SHIPYARDS CORPORATION, *Respondent*

---

On Writ of Certiorari to the Court of Civil Appeals  
of Texas, Third Supreme Judicial District, Sitting  
in Austin, Texas

---

**BRIEF FOR THE RESPONDENT**

---

**STATEMENT OF THE CASE**

Although substantially correct, the Petitioner's statement fails to correlate the facts with due process principles—"taxable event", location of the "taxable event", and the "nexus" between the "taxable event" and Texas.

## 1. The Taxable Event Is The "Purchase And The Premium Payment

Article 21.38(2) (e) defines the "taxable event":

"Sec. 2. Tax on Insurance Premiums, . . . (e). . . If any . . . corporation shall *purchase* . . . (from an unadmitted insurer) . . . a policy of insurance covering risks within this state . . ., such corporation shall pay . . . a tax of 5% of the . . . *premiums paid* . . . Such tax shall be paid not later than thirty (30) days from the *date on which such premium is paid* to the unlicensed insurer." (Emphasis added)

The two indispensable elements in defining the "taxable event" are:

- (1) The "purchase" of unadmitted insurance on Texas risks.
- (2) The "payment" of the premiums.

The operating incidence of a similar tax is defined in *Compania General De Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87:

"It is a tax on the contract or its proceeds which were not in the Philippines or expected to be there."

Although the "taxable event" may be argued to be the "purchase" of insurance measured by the "premium paid", the "taxable event" is the premium payment. If the premiums are not *paid*, no tax is levied—e.g., no tax is levied on uncollected open account sales. Moreover, the payment date is determined by the premium payment rather than the "purchase".

In a credit sale, there may be a "purchase", yet no tax. Payment is a sine qua non of the tax, and no premium may be paid without a tax; the premium payment is the "taxable event"—i.e., the transfer of money, New York property. Petitioner does not mention the "taxable event", but apparently concedes payment is the "taxable event" (Br. p. 3):

" . . . (the Act) levies a 5% tax on the gross premiums paid . . ." (Emphasis added)

Without regard to whether the "taxable event" is the "purchase" or the "premium payment", the stipulation (R. 45) nonetheless conclusively establishes the "taxable event" occurred in New York with no Texas "nexus":

"Each of the policies attached and made the basis of this suit was contracted for, delivered and paid for in the City of New York and State of New York, the domicile of Todd Shipyards Corporation."

"All premiums are payable in New York City and have been paid in New York City."

"Neither Lloyds of London nor the Institute of London Underwriters has ever solicited Todd's insurance business or policies within the State of Texas."

"The Texas plants or offices of Todd Shipyards Corporation do not correspond directly or indirectly nor conduct any negotiations or transactions directly or indirectly with Lloyds of London or the Institute of London Underwriters, but all negotiations or transactions are handled by Todd's agent, Mr. Ed Costello, in New York City with the New York City Agents of the insurer or directly with the London office."

Petitioner concedes no Texas connection with the premium payment (R. 49, Stipulation, R. 186):

"The premiums on each of the insurance policies are paid by and mailed from the Plaintiff's New York office to the New York office of the Broker. *No premium is paid by or from the Texas plants or offices.*" (Emphasis added)

Neither the measure nor the incidence of the tax is related to Texas transactions; Texas simply claims the power to tax Respondent's New York transactions. The operating incidence of the tax falls on Respondent's New York payment which has no reasonable relation to protection, opportunities and benefits afforded by Texas.

The "operating incidence" of the tax is on Respondent. Petitioner agrees (Br. p. 8):

"Subsection (e) levies a tax *upon the insured* buying insurance for property or risks in Texas, so it is apparent that the tax is *not* placed on the unauthorized insurer." (Emphasis added)

Since the insurers are beyond the State's taxing talons, the operating incidence of the tax is imposed on Respondent.

## 2. The Tax Discriminates Against Unadmitted Insurers In Favor Of Texas Insurers

The stipulation (R. 46) clearly demonstrates the discrimination in favor of Texas insurers (R. 187):

"The tax levied . . . on premiums paid . . . on policies purchased from . . . 'unadmitted insurers,' is at the rate of five per cent of the gross premiums. The tax on similar premiums paid to admitted insurers . . . is at rates of a maximum of 3.85% to a minimum of 1.1%, Article 21.38, Texas Insurance Code and Article 7064, V.A.C.S."

In addition to the almost 500% discrimination in the tax rates (1.1% vs. 5%) in favor of Texas insurers, Article 7064 grants "admitted insurers" an additional sweeping tax exemption:

✓ "No occupation tax shall be levied on insurance companies herein subjected to the gross premium receipt tax by any county, city or town . . . The taxes aforesaid shall constitute all taxes collectible under the laws of this State against any such insurance carriers except maintenance taxes specially levied under the laws of this State and assessed by the Board of Insurance Commissioners. . . ."

This sweeping tax immunity further aggravates the rate discrimination. Respondent does not enjoy any similar tax immunity.

In spite of the plain words of Article 7064 to the contrary, the stipulation to the contrary (R. 46), and the State Court's clear holding to the contrary (Pet. C-7), Petitioner erroneously suggests (Br. p. 15) that Article 7064 levies a uniform 3.85% "premium tax" on authorized insurers. The tax ranges from 1.1% to 3.85% depending on the admitted insurer's investment in "Texas Securities". The scale discriminates in favor of Texas insurers and insurers investing in Texas.

In *Kansas City Title Insurance Co. v. Butler*, 253 S.W. 2d 318 (Ref. N.R.E.), the plain purpose of Article 7064 to discriminate in favor of Texas insurers is openly declared:

"The act has for its purpose to encourage by offering a lower tax rate those insurance carriers subject to the Act to make investments in Texas securities and property in this State."

Petitioner's non-discriminatory argument is further refuted by Article 21.38(2)(c) providing in the plainest language for deliberate discrimination:

"(c) When any policy of insurance . . . is procured under authority of such license, there shall be executed . . . an affidavit . . . showing that such insured was unable . . . to procure from any licensed company . . . the full amount of insurance required . . . , and further showing that the . . . insurance procured from non-licensed insurer . . . is *only the excess over the amount so procurable from licensed companies.*" (Emphasis added).

Furthermore, the premium tax on admitted insurers (Art. 7064) and the unadmitted tax paid to licensed agents (21.38 (2) (d)) allow a deduction for "return premiums". No deduction for return premiums is allowed in Article 21.38(2)(e). The patent discrimination accomplished by allowing a credit for return premiums in Article 7064 and Article 21.38 (2) (d), while denying a like credit to Respondent in Article 21.38 (2) (e), further establishes the discrimination.

Petitioner's non-discrimination argument contradicts its regulation argument. For example, in an effort to defend the tax as non-discriminatory, Petitioner states (Br. p. 15):

"The tax levied by Article 21.38 (Section 2) was enacted to equalize the tax burden borne by Texas risks."

But, in its regulation argument, Petitioner (Br. p. 10) admits and, what is more, relies on the deliberate discrimination:



"Then, returning to the question, what is the regulatory effect of the tax levied by subsection (c), the simple effect of the tax is *to reduce the number of owners of Texas risks who purchase insurance from unauthorized companies by making it more expensive to do business with unauthorized insurance companies.*" (Emphasis added)

As Petitioner's regulation argument presupposes, the tax was plainly designed to make "it more expensive to do business with unauthorized insurance companies". This is deliberate discrimination. Petitioner's regulation arguments (Br. pp. 8-16) are each based on the premises that (1) insurance should be placed with regulated Texas insurers, (2) Texas may lawfully discriminate in favor of "Texas insurers", and (3) Texas has discriminated against the New York insurance in order to obtain a "*regulatory effect*", to-wit, discourage New York insurance.

If Petitioner's non-discrimination arguments are accepted, the foundation for Petitioner's "regulation-nexus" arguments is destroyed. This is true, because any "regulatory effect" is wholly dependent on discriminatory rates. In other words, if the rates are not discriminatory, there is nothing to discourage New York insurance, and, consequently, no regulation.

In direct conflict with its argument that the tax was designed to *regulate* by unequal rates, Petitioner incongruously argues that the maintenance taxes levied on fire, casualty and compensation insurers equalize the tax. This is sophistry at its abysmal worst.

First, no compensation policies are in question, and Respondent's compensation is carried by an admitted insurer. Secondly, the casualty tax in Article 5.24 is levied at the rate of 2/5 of 1% of the premiums, and, to the limited

extent applicable to the policies of Respondent, would only slightly reduce the discrimination. Thirdly, only a small portion of Respondent's claim covers fire risk as defined in Article 5.49. This tax is levied at the rate of  $1\frac{1}{4}\%$  and when added to the  $1.1\%$  minimum tax of Article 7064, would reduce the fire discrimination from  $1.1\%$  versus  $5\%$  to  $2.35\%$  versus  $5\%$ . Fourthly, the maintenance taxes are levied as a license fee for the privilege of doing a Texas insurance business, a privilege not extended to Respondent. Therefore, the maintenance taxes do not even reduce the discrimination against Respondent. A fortiori, no tax equalization is intended and none is accomplished by the maintenance taxes.

### **3. No "Minimal Contact" Or "Nexus" Exists**

The "taxable event", the "purchase" of insurance and the "payment" of premiums, occurred solely in New York; therefore, Texas has no connection nor minimal contact with the "taxable event". Texas did not protect nor afford the opportunity to perform the "taxable event"; Texas offered the taxable transaction no protection nor benefit.

The connection to New York and Texas is best presented by comparison:

#### **A. The New York Nexus:**

- (1) Respondent is a New York corporation domiciled in New York (R. 44-45).
- (2) The insurers are domiciled in London, England (R. 45).
- (3) Each policy was contracted for, delivered and paid for in New York (R. 45).

- (4) Neither insurer conducts any investigation of Texas claims in Texas. The adjustment of losses is handled in New York between Respondent's agent and the insurer's agent (R. 45).
- (5) Neither insurer has ever solicited Respondent's insurance business within the State of Texas (R. 45).
- (6) Respondent's Texas plants do not correspond directly or indirectly or conduct any transactions or negotiations directly or indirectly with the insurers. All negotiations and transactions are handled by Respondent's New York agent, in New York, with the New York agents of the insurer or directly with the London office (R. 45).
- (7) The following decisions relative to Respondent's insurance are made in New York, not in Texas: purchase, renewal, extent of coverage, amount of coverage, election of insurers and confirmation of insurance contracts (R. 45).
- (8) All losses are payable and have been paid in New York (R. 45).
- (9) All premiums are payable and have been paid in New York (R. 45).
- (10) Respondent operates shipyards in New Jersey, Louisiana, California, Washington and South America, as well as in Texas (R. 46).
- (11) Neither insurer has a permit from the Texas State Board of Insurance to write insurance in Texas (R. 47).
- (12) Neither insurer submits any statement of its condition to the Texas State Board of Insurance (R. 47).
- (13) None of the affairs of either insurer are in any way subject to examination by the Texas State Board of Insurance (R. 47).
- (14) The Texas State Board of Insurance has no *Control Nor Supervision* over the affairs of either insurer (R. 47).

- (15) At any time material to this suit, neither insurer had an office or agent in Texas (R. 47).
- (16) Norie of the brokerage companies through whom such insurance is purchased for Respondent is located in Texas or is an insurance agent licensed under the law of the State of Texas (R. 48).
- (17) All policies are signed in London, England (R. 48).
- (18) All policies state that they are issued and delivered in London, but that between the insurer and insured, the place of issuance may be considered as New York (R. 48).
- (19) All policies were accepted by Respondent in New York (R. 48).
- (20) All policies are renewed by the payment of additional premiums in New York to the New York agents of the insurers (R. 48).
- (21) Such renewals are negotiated in New York between the New York broker and Respondent's New York agent (R. 48).
- (22) All premiums are paid in New York by Respondent's New York office to the New York office of the broker (R. 49).
- (23) In the case of a builder's risk insurance, Respondent's New York agent applies in New York for such insurance (R. 49).
- (24) After Respondent's New York agent is informed of a loss at one of Respondent's Texas plants, he notifies in New York the New York brokerage house that negotiated the insurance (R. 49).
- (25) Such New York brokerage house appoints the London Salvage Association to prepare an estimate or "survey" of the Texas loss (R. 49).
- (26) The London Salvage Association forwards its estimate of the Texas loss to Respondent's New York office (R. 49).
- (27) London Salvage Association issues a bill to Respondent for services, and Respondent pays in New York (R. 49).

- (28) The loss is adjusted in New York between the New York broker and Respondent's New York agent (R. 49, 50).
- (29) The brokers who placed the insurance involved in this lawsuit are licensed in New York but not in Texas (R. 140, 48).

#### **B. The Claimed Texas Nexus:**

- (1) Respondent is admitted to do business in Texas (R. 44).
- (2) Respondent owns real and personal property in Texas (R. 44).
- (3) The insurance covers "Texas Risks" (R. 44).
- (4) Respondent had about 1500 employees in Texas in November, 1959 (R. 46).
- (5) About 27% of Respondent's business was done in Texas in each of the years 1956, 1957, 1958 and 1959 (R. 46).
- (6) In the case of builder's risk insurance, Respondent's Texas office notifies Respondent's New York agent that Respondent has entered into a construction or repair job (R. 49).
- (7) Builder's risk insurance coverage is requested in the name of Todd's Texas division and identifies Texas as the place where the work is to be performed (R. 49).
- (8) If a loss occurs at Respondent's Texas plants, the Texas plant notifies Respondent's New York agent of such loss (R. 49).
- (9) The London Salvage Association appraises losses occurring at Respondent's Texas plants (R. 49).
- (10) Respondent's Texas plants appraise their losses (R. 49).
- (11) Respondent's Texas plants assist the London Salvage Association in arriving at a fair figure for the loss (R. 49).

None of Petitioner's claimed "nexus" facts are connected with the "taxable event"—"premium payment" and "purchase" of insurance.

Since Respondent is doing business in Texas, Respondent is subject to Texas jurisdiction. But, Texas may not tax Respondent's contracts, purchases and payments in New York—i.e., what Respondent does outside Texas. This case is entirely different from *Travelers H.A. v. Virginia*, 339 U.S. 643, evaluating a corporation's "nexus" in a doing business case. Respondent is admittedly doing business in Texas, but this does not furnish the "nexus" to tax Respondent's New York contracts, payments, properties or transfers.

The distinction in the "nexus" concept applicable to an admitted company is nicely drawn in *Connecticut General Life Insurance Company v. Johnson*, 303 U.S. 77:

"Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere."

*Johnson* teaches that due process keeps Texas' taxing power at home; yet, this tax unlawfully extends the taxing grasp to New York. This is crystal-clear, because Petitioner concedes the "taxable event" occurred in New York.

#### **4. The Unadmitted Insurance Tax Is An Occupation Tax And Not A Regulation**

Although the state court properly ignores Petitioner's regulation argument, Petitioner insists the unadmitted in-

surance tax is a "*Regulation*" rather than a "*Tax*". Yet, the constitutional effect of the "tax" cannot be changed by its characterization. This is the lesson of *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 348:

"The Supreme Court justified the imposition as an occupation tax,—that is, as we understand it, a tax upon the occupation of the defendant. But this court, although bound by the construction that the supreme court may put upon the statute, is not bound by the characterization of it, so far as that characterization may bear upon the question of its constitutional effect."

However, Petitioner's insistence that the "tax" is a "regulation" is devoid of merit. Shortly after the enactment of the tax in 1957, the State administrators determined that the tax is an "*Occupation Tax*" (R. 137, 38-43). Texas has set aside one-fourth of the tax to the public free school fund as required of all occupation taxes by Article VII, Section 3, of the *Texas Constitution*. This was done, because the administrators classified the tax as an occupation tax (R. 38-43). Although Petitioner argues regulation rather than taxation, the administrators deliberately found taxation rather than regulation. In light of the administrative finding, Petitioner's regulation argument is impotent.

Moreover, at the time of the tax's enactment, the Legislature expressly declared its purpose in Section 7 of Chapter 395 of the Laws of the Regular Session of the 55th Legislature as follows:

"Sec. 7. The fact that the present laws relating to the placement of surplus lines of insurance do not provide adequately *for the conditions under which it*



*shall be placed with unauthorized insurers in a manner which will insure the collection of the tax levied upon the premiums charged or paid for such insurance creates an emergency and an imperative public necessity. . . ."* (emphasis added)

In light of this openly avowed declaration of intention to insure collection of the *tax on premiums*—i.e., the collecting of the tax theretofore levied in Article 21.38(2) (d) and thereupon levied in Article 21.38(2) (e)—Petitioner's argument of a different intention is untenable. In other words, the 1957 amendment simply eliminated the only possibility—paying premiums directly to "unauthorized insurers"—for avoiding the discriminatory five per cent (5%) tax imposed by Article 21.38(2) (d) in 1951.

The Legislative purpose—to tax and to collect the tax, as a revenue measure—was carried into effect by the administrative construction. Any attempt to renounce the Legislature's avowed tax purpose is plainly without merit and an untimely afterthought induced by this case.

Petitioner's pretension that the tax is something else, regulation, is refuted by Petitioner's stipulation that neither of the insurers was subject to Texas regulation (R. 47). This is confirmed by the testimony of the administrator (R. 38):

"Q. Do you do anything to try to regulate where or from whom Todd Shipyards buys its insurance?

A. No, sir."

## **5. Respondent's Domicile Is New York**

The Petition (p. 10) states, "Respondent is a Texas resident". Respondent does not know in what sense "resident" is used by Petitioner, but the stipulation (Tr. p. 46) conclusively establishes Respondent's domicile in New York:

"Todd Shipyards has its principal office, principal place of business and domicile in New York City, New York."

Respondent is a resident of Texas only in the sense that each foreign corporation having a place of business and a permit to do business in Texas is a Texas resident. Therefore, Texas' jurisdiction to tax may not be sustained on the basis of a Texas domicile, as might be done in an intangible tax case; see *Kirtland v. Hotchkiss*, 100 U.S. 491; *Central Hanover Bank & Trust Company v. Kelly*, 319 U.S. 94.

#### **6. Respondent Has Paid All Taxes Required For The Privilege Of Doing Business In Texas**

Since 1934 Respondent has duly maintained its Texas "permit to do business" and has duly paid all taxes, fees and charges levied against Respondent for its Texas "permit to do business" and has duly paid all taxes, fees and charges levied against Respondent for the privilege of doing business in Texas (R. 46). Respondent was admitted for 23 years before the tax; Petitioner does not attempt to justify this tax as a tax for the granted privilege of doing business.

#### **7. The Insurers Do Not Do Business In Texas**

Petitioner concedes that the insurers are not admitted to do business in Texas and do not do business in Texas (R. 47). Respondent is in the ship repair, conversion and construction business, not the insurance business (R. 46-47).

## **8. The Trial Court's Constitutional Holding Is Not Limited To Due Process**

Petitioner's Brief, page 3 states:

"The Trial Court found the tax invalid as a violation of due process."

The judgment does not limit its findings of unconstitutionality to the due process point, but, on the other hand, broadly declares the tax unconstitutional without specifying the Texas or U. S. Constitutional ground (R. 179):

" . . . Texas Insurance Code, Article 21.38(2) (e) is unconstitutional and void as applied to the . . . taxes unlawfully exacted from Plaintiff."

## **9. The Tax Applies Without Regard To Availability In Texas**

The tax applies to unadmitted insurance whether available in Texas or not. Section (d) assumes some of the unadmitted insurance is not available in Texas by permitting a licensed broker to purchase in the unadmitted market, if, but only if, the insurance is not available in the admitted market.

The necessity of purchases in the unadmitted market rebuts Petitioner's economic and regulatory arguments. If Texas insurance is not available, the tax cannot coerce an impossible "admitted" purchase as contemplated by Petitioner's economic and regulatory arguments. In a nutshell, the failure to base the tax on Texas' availability precludes any regulatory or economic purpose.

### Questions Presented

- (1) Is the Texas unadmitted insurance tax levied on Respondent's New York contracts and premium payments unconstitutional under the due process clause of the U. S. Constitution's Fourteenth Amendment as held by the Texas courts on the authority of *St. Louis Cotton Compress Co. v. State of Arkansas*, 260 U.S. 346? Since Petitioner does not distinguish *St. Louis Compress*, the threshold question is simply, "should *St. Louis Cotton Compress* be overruled?"
- (2) Should this Court follow the law established and followed since 1896 in *Allgeyer*, *St. Louis Compress*, *Compania General De Tabacos De Filipinas*, and *Connecticut General Life Insurance Company*, because Respondent's business and the business of insurance have been "left for 65 years to develop, on the understanding" that Respondent was not obligated to pay the challenged tax?
- (3) Is the arbitrary discrimination against unadmitted insurers and in favor of Texas insurers embodied in the tax unconstitutional under the equal protection clause of the U. S. Constitution's Fourteenth Amendment?
- (4) Does the Court have jurisdiction, when the Texas Supreme Court may have rested its judgment upon an adequate State ground?

## SUMMARY OF ARGUMENT

### 1. The Due Process Argument

A. The tax is condemned by due process of law because levied on a "taxable event" outside the state.

B. The tax is condemned by the *St. Louis Cotton Compress Co. v. State of Arkansas*, 260 U.S. 346; *Allgeyer v. Louisiana*, 165 U.S. 578; *Compania*, 275 U.S. 87, and *Connecticut General Life Insurance v. Johnson*, 303 U.S. 77.

C. *St. Louis Compress* should not be overruled.

- (1) Petitioner's authorities do not conflict with *St. Louis Compress*.
- (2) The *Toole*, 346 U.S. 356, rule precludes overruling *St. Louis Compress*.
- (3) *St. Louis Compress* should not be overruled, because its constitutional policy is sound.
  - (a) The states' taxing power must remain at home.
  - (b) Texas should not be permitted to tax or regulate the New York insurance market.
  - (c) If *St. Louis Compress* is overruled, the states will adopt conflicting regulations and taxation.
- (4) *St. Louis Compress* is not dormant authority, but was recognized in March, 1960, in *Federal Trade Commission v. Travelers Health Association*, 362 U.S. 293, 301.

D. Texas does not have the "nexus" required to obtain jurisdiction to tax Respondent's New York contracts and premium payments.

(1) The "taxable event" has no connection with Texas.

E. Petitioner's jurisdiction to tax is not determined by discrimination.

## **2. The Equal Protection Argument**

A. Article 21.38(2)(e) discriminates in favor of admitted insurers and against unadmitted insurers.

B. Equal protection condemns the state's attempt to favor admitted insurers and discriminate against unadmitted insurers.

(1) *Hanover Fire Insurance Company v. Carr*, 272 U.S. 494;

(2) *Wheeling Steel Corporation v. Glander*, 337 U.S. 562.

C. The exemption of admitted insurers from the tax denies equal protection.

(1) *Morey v. Doud*, 354 U.S. 457.

## **3. The Jurisdiction Question**

A. The Texas Supreme Court may have rested its judgment on an adequate state ground, i.e., the tax violated the due process clause and the equality and uniformity clause of the Texas Constitution.

B. Therefore, the United States Supreme Court has no jurisdiction of this case. *Durley v. Mayo*, 351 U.S. 277.

## Argument

### 1. Due Process Argument

Jurisdictional boundaries on the state's taxing power were drawn prior to due process. The limitation was originally expressed in terms of "fundamental law" and "lack of jurisdiction over the subject matter". See *Case of the State Tax on Foreign-Held Bonds*, 82 U.S. 300; *Northern Central Railway Co. v. Jackson*, 74 U.S. 262. Since the Fourteenth Amendment, the boundaries of the state's tax jurisdiction have been expressed in terms of due process. Although the boundary may be narrow, the challenged tax is condemned by an old, well defined, jurisdictional boundary. *Allgeyer v. Louisiana*, 165 U.S. 578; *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346; *Compania General De Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87; *Connecticut General Life Insurance Co. v. Jobson*, 303 U.S. 77. The tax has been consistently condemned by constitutional policy since *Allgeyer*, 165 U.S. 578, in 1896.

#### **A. The Tax Is Condemned By The *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 Line Of Cases.**

As stated by the state courts (R. 190, 242), *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 is indistinguishable and invalidates the Texas tax. Moreover, Petitioner concedes *St. Louis Cotton Compress* is controlling, but argues it has been or, at least, should be "cast aside" (Br. p. 7).

The Stipulation (R. 4-i) establishes the *St. Louis Cotton Compress* facts set forth in a succinct opinion of Justice Holmes, as follows:



"This is a suit by the State of Arkansas against a corporation of Missouri *authorized to do business in* Arkansas. It is brought to recover 5 per cent on the gross premiums paid by the defendant, the plaintiff in error, for insurance *upon its property in Arkansas, to companies not authorized to do business in the State*. A statute of the state purports to impose a liability for this amount as a tax . . . The answer alleged that the policies *were contracted for, delivered, and paid for in St. Louis, Missouri*, the domicile of the corporation, because the rates were less than those charged by companies authorized to do business in Arkansas. It is also alleged that long before the taxing act was passed the defendant had made large investments in Arkansas in real and personal property essential to the conduct of its business, which it has held and operated ever since. . . .

" . . . *It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside.*" (Emphasis added)

Respondent's position and the Texas tax are identical to *St. Louis Compress'* position and the Arkansas tax. Petitioner is simply at war with *St. Louis Compress*.

*St. Louis Compress* was reaffirmed in *Compania General De Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, by condemning the tax on the extra-territorial premiums paid to an unadmitted insurer (Paris insurer) that could not be justified as a tax for the privilege of doing business; *Compania*, however, justified the same tax on extra-territorial premium payments to the admitted insurer (London insurer) as a tax on the privilege of doing business. Respondent is in the same position as the unadmitted (Paris) insurer in *Compania*. The Texas tax is

not for a privilege to do business, because (1) Petitioner concedes Respondent has paid all taxes for doing Texas business (R. 46), and (2) Respondent's insurers were not admitted and did not do business in Texas (R. 44-49).

Although due process was not controlling in *Compania*, the same principles were controlling. These principles are sharply defined:

"The collection of this tax involves an exaction upon a company of Spain lawfully doing business in the Philippine Islands effected by reason of a contract made by that company with a company in Paris on merchandise shipped from the Philippine Islands for delivery in Barcelona. It is an imposition upon a contract not made in the Philippines and having no situs there and to be measured by money paid as premium in Paris, with the place of payment of loss, if any, in Paris. We are very clear that the contract and the premiums paid under it are not within the jurisdiction of the government of the Philippine Islands."

The Texas tax is on a contract and payment not made in Texas—no Texas situs—with the place of payment of loss, if any, in New York. As stated in *Compania*, the contract and the premiums paid were not within the jurisdiction of Texas.

*Compania* draws a jurisdictional boundary placing payment to admitted companies (*Compania's* London insurer) inside and to unadmitted companies (*St. Louis Compress*) outside the boundary on substantially identical transactions. This boundary may be narrow, but "a boundary line is none the worse for being narrow".

*Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, condemns a California tax on premiums paid to

an admitted insurer in Connecticut on Connecticut contracts. The premiums were paid and the losses were payable in Connecticut. The jurisdictional boundary is correctly defined:

"But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained *by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. . . .*"

"Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. . . . Apart from the facts that appellant was privileged *to do business in California*, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California has no relationship to appellant or to the reinsurance contracts. *No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection.*"

"... All that appellant did in effecting the reinsurance was done without the state *and for its transaction no privilege or license by California was needful*. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state." (Emphasis added)

*Johnson* also squarely condemns Texas' attempt to levy an extra-territorial tax on Respondent. Respondent's position is stronger than in *Johnson*, since (1) the *Johnson* insurer was doing business in the taxing jurisdiction, and (2) if continued in effect, losses on a *Johnson* life policy were inevitable, while Respondent's losses are not inevitable but controlled by chance phenomena.

The same boundary is drawn in *Allgeyer v. Louisiana*, 165 U.S. 578, condemning a fine imposed for insuring with unauthorized insurers.

### **B. St. Louis Compress And Its Progeny Should Not Be Overruled.**

Petitioner does not attempt to distinguish *Allgeyer*, *St. Louis Compress*, *Compania* or *Connecticut General*, but, nevertheless, insists that, although controlling, they are "repudiated" by current policy and should, therefore, be overruled.

In the first place, Petitioner's authorities do not conflict with *St. Louis Compress*. Petitioner's reliance on conflict with *Osborn v. Ozlin*, 310 U.S. 53, and similar cases, is misplaced. In *Osborn* the Virginia statute provided that no insurance on Virginia property should be issued by an admitted company unless countersigned by a resident agent who was forbidden to share more than 50% of his commission with non-resident brokers; the Court held that

since (1) the statute was applicable only to admitted companies, and thus, within the granted privilege, and (2) the statute was not aimed at contracts beyond Virginia's borders, due process was not denied. *Osborn* specifically distinguishes *St. Louis Compress Co.*, *Compania* and *Allgeyer* on the basis that *Allgeyer*, *St. Louis Compress* and *Compania* (1) were not directed at the regulation of insurance within the state, but to the making of contracts outside the state, and (2) the *St. Louis Compress* tax was not for a granted privilege.

Since *Osborn* carefully distinguishes *St. Louis Compress*, *Osborn* is no authority for overruling *St. Louis Compress*. Moreover, *Osborn* does not uphold any tax, much less an extra-territorial tax, and holds nothing on a state's extra-territorial taxing power.

Petitioner also relies on *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, upholding New York's right to regulate an admitted insurer as a condition to admission. The *Allgeyer* and *St. Louis Compress* rule is distinguished in *Hoopeston Canning Co.*, and, therefore, *Hoopeston* cannot justify overruling *St. Louis Compress*. Furthermore, *Hoopeston* is not a tax case with an extra-territorial "taxable event".

*Travelers Health Association v. Virginia*, 339 U.S. 643, (1) is not a tax case, (2) does not overrule *St. Louis Compress*, (3) upholds state jurisdiction of an insurer doing business within the state, (4) upholds substituted service, and (5) holds nothing on extra-territorial transactions. *Travelers Health Association* is not in point. The opinion correctly points out that *Osborn*, *Hoopeston* and *Travelers* do not conflict with *Allgeyer*, 339 U.S. 650:

"... *Hoopeston Canning Co. v. Cullen*, supra, 318 U.S. 320, 321, 87 L. Ed. 784, 785, 63 S. Ct. 602, 145

ALR 1115). See also *Osborn v. Ozlin*, 310 U.S. 53, 62 L. Ed. 1074, 1077, 60 S. Ct. 758. These two opinions make clear that *Allgeyer v. Louisiana*, 165 U.S. 578, 41 L. Ed. 832, 17 S. Ct. 427, requires no different result."

*Watson v. Employers Liability Assurance Corporation*, 348 U.S. 66, upholds a "direct action" statute against an admitted insurer. No extra-territorial transaction was presented by *Watson*. *Watson* does not conflict with *St. Louis Compress* as noted in the concurring opinion, 348 U.S. 66, 83. *Watson* does not justify overruling *St. Louis Compress*.

In the second place, *St. Louis Compress* and its progeny trace their origin to the 1896 *Allgeyer* decision. For more than 65 years the insurance and Respondent's businesses have been "left to develop" on the understanding that constitutional policy precludes the challenged tax. Moreover, Respondent entered Texas in 1934, made large investments in Texas and developed its Texas business for more than 23 years on the understanding that Respondent was not subject to the tax.

*Toolson v. New York Yankees, Inc.*, 346 U.S. 356, holds a statutory policy of 30 years should not be overruled, because the business of baseball had been "left for 30 years to develop" on the understanding that it was not subject to existing anti-trust legislation. In a short opinion, the court squarely holds that the law should not be re-examined, if a business has been permitted to develop in reliance on a prior, long-standing decision:

"In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 66 L. Ed. 898, 42 S. Ct. 465, 26 ALR 257 (1922),

this Court held that the business of providing public baseball games for profits between clubs of professional baseball players was not within the scope of the federal antitrust laws. Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing anti-trust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the anti-trust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed."

*Toolson* should be applied to constitutional as well as statutory policy. This is especially true, because the Congress may not have pre-empted this area in reliance on *St. Louis Compress*. For example, after the *Southeastern Underwriters* decision in 1945 in a committee report on the McCarran-Ferguson Act, the Congressional intention and reliance on *St. Louis Compress* was plainly recorded:

"It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the states, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U.S. 578),



*St. Louis Cotton Compress Co. v. Arkansas* (260 U.S. 346) and *Connecticut General Life Insurance Co. v. Johnson*, (303 U.S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way." (H.R. Rep. No. 143, 79th Congress, 1st Sess. 3).

The Congressional reliance on the *St. Louis Compress* line of authority confirms the soundness of *Toolson* when applied to constitutional policy. This Congressional intention was quoted and the policy approved in *Federal Trade Commission v. Travelers Health Association*, 362 U.S. 293, 301. Not only have the insurance and Respondent's businesses been left to develop in reliance on the understanding that *St. Louis Compress* expressed constitutional policy, the Congress was left to develop the relation between the State and Federal governments (pre-emption vel non) on the same understanding.

In light of the development of the insurance and Respondent's businesses plus Congressional reliance in adopting the McCarran-Ferguson Act, the *Toolson* rule should be followed, and *St. Louis Compress* should not be overruled.

In the third place, the *St. Louis Compress* constitutional policy is sound. The policy is aimed primarily at keeping the state's taxing power at home and avoiding conflicts between state laws. If Petitioner's proposal to permit Texas to tax New York contracts is adopted, a conflict in the laws of the two states may soon develop in an unseemly struggle by each state to favor its own. New York's power to regulate New York contracts could not reasonably be denied. A conflict may easily arise by conflicting "reserve

requirements" or conflicting "investment restrictions"; in the event of conflict, which state law would control? To which state would belong the coveted power to pre-empt the regulatory field? The point Respondent makes is that, if *St. Louis Compress* is overruled, the constitutional relationship among the states will be drastically affected by the opportunity to adopt conflicting regulation.

If the states of New York and Texas are each permitted to tax the same premium payments, there will inevitably result, not only double, if not multiple, taxation among the states, but an unseemly race among the states to gain new tax sources by contriving to tax extra-territorial transactions. If Texas is allowed to tax New York premium payments, Texas' taxing power will be released to roam unconfined and vagrant on property, transactions, occupations and business done in other states. This will not do, if the dual federal system is to survive.

In order to justify reshaping the historical boundary established in *St. Louis Compress*, Petitioner is content to rely on one and only one policy argument, to-wit: the State's interest in regulating or discouraging the placing of unadmitted insurance. The short answer is that (1) the "admitted insurance" market cannot and does not offer all of the coverage required by Respondent, and Respondent's resort to the New York market is necessary, whether discouraged or not, (2) the tax is levied (Article 21.38(2)(c)) without regard to whether admitted insurance is available or not, and (3) Texas' interest, however great, cannot reasonably be permitted to regulate or tax the New York insurance market.

Judge Holmes' genius for condensation permitted this policy to be reduced to a few words (260 U.S. 346):

"It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside."

Article 21.38(2)(c) and (e) impose the tax, whether the insurance is available in Texas or not, and, therefore, provide in clearest language for extension of the Texas taxing arm to the New York insurance market. The New York insurance market should not be made vulnerable to Texas control.

#### **C. St. Louis Compress Is Not Dormant Authority.**

As late as 1960, the authority of *St. Louis Compress* and *Connecticut General Life Insurance Company* was recognized in *Federal Trade Commission v. Travelers Health Association*, 362 U.S. 293, 301.

#### **D. Texas Does Not Have The "Nexus" Required To Obtain Jurisdiction To Tax Respondent's New York Contracts And Premium Payments.**

Petitioner does not employ the conventional due process jurisdictional words of art, "nexus", "connection" or "minimal contact", but, perhaps, is saying the same thing by referring to the "interest of Texas". For example, Petitioner's Brief, page 10, characterizes the jurisdictional connection in this manner:

"Since the validity of subsection (e) must be determined by the 'degree of interest of Texas' in the insurance contracts, it is then important to examine the interest of Texas in this insurance. . . ."

Each of Petitioner's "nexus" or "interest of Texas" arguments has been fully answered in the *St. Louis Com-*

press line of authority. In *St. Louis Compress*, the "nexus" argument was tersely refuted (260 U.S. 349):

"The case is stronger than that of *Allgeyer* in that here no act was done within the state, whereas, there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the state may regulate the activities of foreign corporations within the state, but it cannot regulate or interfere with what they do outside."

Petitioner's stipulation (R. 44-48) concedes no act relating to the insurance purchase, contract or premium payment was done in Texas. Therefore, no part of the "taxable event" was done in Texas. The stipulation tracks the language of *St. Louis Compress*, 260 U.S. 346, and *Johnson*, 303 U.S. 77.

In *Compania*, 275 U.S. 87, Petitioner's "nexus" argument based on the Texas location of the insured property is deliberately rejected:

"But such reference can not be made a basis for an argument that such protection as the government of the Philippine Islands gave to the merchandise while being shipped at Manila furnished any jurisdiction for a tax by that Government on the premium paid in Barcelona upon the insurance contract. If that were to be admitted, then neither the *Allgeyer* nor the *St. Louis Cotton Compress Co. Case* could be sustained, for the property in each of those cases was protected by the government seeking to impose the forbidden exactions upon the owner who obtained the insurance out of the state on that property within it. The tax here is not on the property insured. It is a tax on the contract or its proceeds which were not in the Philippines or expected to be there." (Emphasis added)

Petitioner's situs of the risk argument is squarely rejected in *Allgeyer*, *St. Louis Compress*, *Compania* and *Johnson*.

Most of Petitioner's "nexus" arguments are based on the Texas location of the property insured, but, as held in *Compania*, the tax is not on the property. Rather, the tax is on the contract and the premiums which were never in Texas. The distinction between a tax on Texas property, and the tax on the New York contract or premium payment is decisive. This is especially true, since (1) Petitioner admits Respondent's payment of all property taxes, and (2) the tax is not based on property but solely on the admitted or unadmitted status of the insurer.

In *Johnson*, 303 U.S. 77, the state's interest in the lives of its residents was rejected as a jurisdictional "nexus". In *Johnson*, the Connecticut reinsurance contracts related to California contracts insuring the lives of California residents. But, the California insureds and contracts were held not to be a sufficient jurisdictional "nexus" to give California jurisdiction to tax the Connecticut reinsurance contract. Yet, *Johnson* presents a stronger jurisdictional "nexus" than is available to Petitioner, for (1) the state's relative interest in lives and property preponderates in favor of the lives in *Johnson*, and (2) the insurer was admitted.

Petitioner's economic arguments imagining the possibly dire economic consequences of a failure to pay a large loss, if it ever happens, are squarely rejected in *Johnson*, 303 U.S. 77, 80:

"But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of

the tax upon its objects rather than the *ultimate thrust of the economic benefits and burdens of transactions within the state.*" (Emphasis added)

Jurisdiction to tax may not be predicated on the "ultimate thrust" of economic benefits and burdens of insurance and possible losses, if occurring, in the state. Neither may jurisdictional nexus be established by chimerical, economic consequences that have never happened and may never happen.

Jurisdictional "nexus" may not reasonably be based on vagrant conjectures of "possible" economic catastrophe superimposed on Petitioner's fanciful visions of possible future, fortuitous losses rather than existing facts or probabilities. For example, Petitioner's economic arguments are wholly conditioned on imagined, fortuitous, possible, future circumstances, to-wit:

- (1) If Respondent has a large loss.
- (2) If the insurers fail to pay the losses; yet Petitioner offers no evidence to support this possibility, although Respondent has purchased similar insurance from these insurers since 1934 (R. 48).
- (3) If the insurers fail to pay, and if Respondent is unable to replace any future loss from its own resources.

A jurisdictional connection may not be based on imagined, fortuitous, speculative, economic effects of possible, future, fortuitous events that may never come to pass. Nexus must be based on existing "taxable events". If Petitioner's economic arguments are carried to their logical conclusion, Petitioner has a sufficient nexus with

the insurance of New York or California risks in New York, since, under some hypothetical chain of events or nuclear war imagined by Petitioner, a New York or California loss may possibly impair Respondent's capital and, thereby adversely affect its Texas business and employees.

Petitioner's economic and regulation arguments erroneously assume the taxed insurance is available from Texas insurers. This is true as to some but not all of Respondent's insurance; some of the insurance is not available from Texas insurers. As to the insurance unavailable in Texas, Petitioner's economic and regulation arguments are plainly specious; the state could hardly deny that Respondent, the economy and the "Texas interests" are better protected with unadmitted insurance than none and are better protected with unregulated insurance than none. The tax (Article 21.38(2)(e)) is not conditioned on the availability of admitted insurance. Moreover, Article 21.38(2)(c), as well as section (e), deliberately imposes the tax even though the insurance is not available in Texas.

#### **E. Petitioner's Jurisdiction To Tax Is Not Determined By Discrimination.**

Although *St. Louis Cotton Compress*, 260 U.S. 346, invalidated a discriminatory tax, *Compania*, 275 U.S. 87, teaches that discrimination is not indispensable to the *St. Louis Cotton Compress* rule. The *Compania* opinion makes this crystal-clear, 275 U.S. 95:

"Reference was made in the *St. Louis Cotton Compress Co. Case* to the fact that that which was imposed was larger than would have been the tax in the state if all parties had been in the state and the con-



tract had been made there, but the decision itself clearly does not depend for its basis upon discrimination as between a tax and a prohibition or the amount of it."

However, the tax plainly subjects contracts with unadmitted insurers to discriminatory rates favoring admitted insurers. (Compare Article 21.38(2)(c), *Insurance Code* with Article 7064). Respondent's discrimination argument is addressed to the "equality" rather than the "due process" question.

**F. The Tax Is Not Levied On Losses, But The Losses, If Occurring, Are Adjusted And Paid In New York.**

The tax is not levied on insurance "losses" nor the adjusting of "losses" but is levied on the contract and premium payment without regard to "losses". Petitioner may not sustain the tax as a tax on "losses" that may or may not occur in the future; its arguments based on Texas' connection with "losses", if any, are patently specious. The same "loss nexus" was present in each of the *St. Louis Cotton Compress* lines of authority. "Losses" are adjusted and paid in New York (R. 49-50).

The only loss in the record (R. 134-135) was appraised in South Carolina by a Florida appraiser. This was under a Houston, Texas "builder's risk" policy, and Texas had absolutely no connection with the loss or its appraisal. As demonstrated by this loss, if Texas has a connection with a builder's risk loss, it is solely by chance. The requisite jurisdictional nexus may not be based on such chance phenomena—i.e.—(1) the chance a loss will occur, and (2) the chance the loss will be appraised in Texas.

**G. The Tax Is Not In Return For Respondent's Privilege To Do Business In Texas.**

Petitioner admits Respondent paid all of the taxes required for its privilege to do business in Texas (R. 46). Therefore, Petitioner concedes the "nexus" is not any privilege granted Respondent by the State.

**H. The Nexus Must Relate To The "Taxable Event."**

The requisite jurisdictional "nexus" must relate to the "taxable event" or the "taxable transaction"—Respondent's contract or the premium payment. Petitioner concedes the "taxable transaction" has no connection with Texas (R. 44-48). See *McLeod v. Dilworth*, 322 U.S. 327, a commerce clause, sales tax case, emphasizing and turning on the situs of the "taxable event".

**I. The Notification Of Respondent's New York Office Of The Making Of Ship Repair Contracts Is Not A Sufficient Nexus With The Builder's Risk Insurance.**

This notification (R. 49) extends only to the builder's risk insurance. The insufficiency of this nexus is clearly within the holding of *Compania*, 275 U.S. 87, 89, where the same basic law existed:

"Subsequent to the purchase of the merchandise, the Tobacco Company from time to time shipped it to Europe, and by cable notified its head office in Barcelona of the value of the shipments. The head office thereupon insured with the Paris Company. . . ." (emphasis added)

## **J. The State's Power To Control The Objects Of The Tax Mark The Boundary Of The State's Jurisdiction To Tax.**

In *Johnson*, 303 U.S. 77, the limits of the state's jurisdiction to tax is defined in terms of the state's right to control the objects of the tax, 303 U.S. 80:

"As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it."

In the face of transgressing this plain, jurisdictional boundary—i.e., the state's jurisdiction is limited to objects under its control—the state, nonetheless, frankly concedes that Texas has no supervision nor control over the insurance contracts (R. 44-47). Petitioner's regulation arguments are premised on its admitted inability to control the insurance contracts. This being true, the state has no jurisdiction to tax the contracts and payments which are beyond the state's power to control.

Apart from Respondent's Texas privilege to do business and the Texas location of the insured property, Texas has no connection with the taxed contracts or premium payments. No act in the making of the premium payments or the contracts took place in Texas. Respondent's making of the New York contracts and premium payments were not dependent on authority granted by Texas and were not afforded any protection by Texas. Texas may not withdraw nor impair Respondent's privilege of doing business in New York under the guise of either regulation or taxation. All that Respondent did was done in New York, and Respondent needed no Texas license. The tax cannot

be sustained as a tax on property, business done or transactions carried on in Texas. Neither may the tax be sustained as a tax on a privilege granted by the state. Therefore, the judgment invalidating the tax should be affirmed.

## 2. Equal Protection Argument

At the outset, Petitioner's argument that Respondent may not complain of the constitutionally unequal classification of insurers—admitted—unadmitted—, must be fairly met. Petitioner furnishes the basic premise (Br. p. 8):

*"Subsection (e) levies a tax upon the insured buying insurance for property or risks in Texas, so it is apparent that the tax is not placed on the unauthorized insurer."* (Emphasis added)

The burden of the tax is unequivocally imposed on Respondent who is the target of the classification. The arbitrary classification was adopted to reach and affect Respondent's class and no other class. Yet, Petitioner argues the insurers—who are not affected—rather than Respondent—who is adversely affected—are the only persons who may challenge the classification. If the taxpayer cannot challenge the unlawful tax, Respondent may look for protection only to a disinterested insurer. Respondent may not be left without a practical remedy unless, by chance, a disinterested insurer vicariously protects its interest.

In a nutshell, the tax is levied on the person paying premiums to the defined insurer class rather than directly on the insurer class; yet, the taxable classification is nevertheless based solely on the insurer's admitted or unadmitted status. *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, upholds a lessee of the United

States in an attack upon a discrimination against those dealing with the United States. *Phillips Chemical* teaches that Respondent may attack the unequal classification, since it deals with and is affected by the discriminatory classification.

**A. The Rate Discrimination And Intention To Discriminate Against Unadmitted Insurers Is Plain.**

Petitioner does not really argue that the statute is non-discriminatory (Br. p. 10):

" . . . (e), the simple effect of the tax is to reduce the number . . . who purchase insurance from unauthorized companies by making it more expensive to do business with unauthorized insurance companies."

Article 21.38(2)(c) establishes the discriminatory purpose by requiring inability to obtain admitted insurance as a condition to buying in the unadmitted market. See Article 21.38(2)(c):

"(c) When any policy of insurance or certificate of insurance is procured under authority of such license, there shall be executed by the insured an affidavit setting forth facts showing that such insured was unable after diligent effort to procure from any licensed company or companies the full amount of insurance required to protect the property, liability or risk desired to be insured, and further showing that the amount of insurance procured from nonlicensed insurer or insurers is only the excess over the amount so procurable from licensed companies."

The discriminatory rates, unequal treatment of return premiums, unequal grants of tax immunity, and the de-

liberate attempt to favor admitted insurers is fully set forth in the Statement of the Case.

**B. Equal Protection Condemns The State's Attempt To Favor Domestic Insurers And Discriminate Against Foreign Insurers.**

The unconstitutionality of a discrimination favoring domestic over foreign insurers has been well established since *Hanover Fire Insurance Company v. Carr*, 272 U.S. 494, invalidating under the equal protection clause, an Illinois net receipts tax levied on foreign corporations but exempting domestic corporations. The opinion tersely condemns the foreign-domestication corporation classification:

"But an occupation tax imposed upon 100 percent of the net receipts of foreign insurance companies admitted to do business in Illinois is a heavy discrimination in favor of domestic insurance companies of the same class and in the same business, which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent of the full value of the property. It is a denial of the equal protection of the law." (Emphasis added)

*Hanover Fire* teaches that "Equal Protection" condemns taxes that favors domestic insurers and discriminate against foreign insurers.

The Court has uniformly condemned as constitutionally "unequal" all attempts by the states to favor transactions with *residents* and to discriminate against transactions with *non-residents*. The leading case is *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, holding a tax on intangibles of a foreign corporation, although exempting identical in-

tangibles of residents, is an unconstitutional classification. *Glander* plainly declares that state taxation may not establish classifications to *favor residents* and to *discriminate against non-residents*.

The Court said:

"It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but *solely because of the different residence of the owner.*" (Emphasis added)

Respondent is not accorded equal treatment and the inequality is not because of the slightest difference in Texas' relation to the premium payment, but the inequality is solely because of paying premiums to "unadmitted" insurers. The inequality deliberately favors Texas insurers and deliberately discriminates against the New York insurance market.

*Glander* teaches that (1) a state tax must equally apply to its residents and a foreign corporation, and (2) "Equal Protection" denies the states the right to favor their residents over non-residents. The Texas unadmitted insurance tax does not apply equally to admitted (residents) and unadmitted insurers (non-residents) and falls within the constitutional policy of *Glander*.

A more recent case, *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, upheld an Ohio tax favoring property of non-residents and discriminating against property of residents. Yet, the concurring opinion carefully preserves *Glander's* authority and declares that any attempt to favor residents is "mechanically" condemned, i.e., discrimination in favor of residents is unlawful. The concurring opinion states:



"There is, therefore, no reason to judge the state action mechanically by the same principles as state efforts to favor residents."

The Texas tax may be condemned "mechanically", because the tax is a clear effort to favor residents and "those paying tribute to the state".

Although the Court has approved many different schemes of classification and has approved a classification favoring non-residents over residents, the Court has uniformly condemned all attempts by states to levy taxes discriminating in favor of domestic corporation and discriminating against foreign corporations.

The point Respondent makes is that equal protection prevents a classification in favor of admitted and discriminating against unadmitted insurers. To state the point in yet another way, a classification of admitted and unadmitted insurers so as to favor the admitted insurers is an arbitrary and unconstitutionally unequal classification.

It is true that the tax accomplishes its intended discrimination by distinguishing between "admitted" and "unadmitted" insurers and does not expressly base the discrimination on residence and non-residence or on domestic and foreign insurers. No constitutionally relevant distinction may be made between the classification of "admitted and unadmitted insurers" and the classification of domestic and foreign insurers in *Hanover Fire*. Texas' effort to favor admitted and to discriminate against unadmitted insurers has the same vices as discrimination in favor of domestic over foreign insurers. Each of these discriminations permits the state to favor its own and is condemned by "Equal Protection".

The following classifications are constitutionally unequal:

- (1) Domestic-Foreign Corporation classification favoring domestic corporation (*Hanover Fire, Glan-der*).
- (2) Admitted—Unadmitted Insurance Company classification favoring admitted insurers, which is merely another way of favoring domestic insurers over foreign insurers.

### **C. The Exemption Of Domestic Insurers From The Tax Denies Equal Protection.**

The Texas taxable event is the *payment of premiums* on Texas risks. All persons paying premiums on Texas risks to admitted insurers are exempt. The arbitrary exemption of payments to admitted insurers renders the tax unconstitutionally unequal. This "no-exemption" principle was followed in *Morey v. Doud*, 354 U.S. 457 when an Illinois license and regulatory statute applying to firms "selling or issuing money orders"—but exempting the American Express Company—was condemned as a denial of "Equal Protection".

In other words, after Illinois decided to regulate the "Selling and issuing of money orders" all people so selling and issuing are required by "Equal Protection" to be treated equally.

The *Morey* principle requires that all persons "paying premiums on Texas risks" be taxed equally and condemns the attempted Texas exemption in favor of payments to domestic insurers.

In a nutshell, Respondent's equality arguments are two-pronged:

- (a) First:—Although the State may reasonably classify taxable events (premium payments on Texas risks), the State may not classify the persons performing the taxable event ("persons paying to admitted or unadmitted insurer"). The classification of persons renders the tax constitutionally unequal.
- (b) Second:—Even though the State has the right to classify persons paying the taxed premiums, nevertheless, the attempted discriminatory classification in favor of payments to admitted insurers and against unadmitted insurers is constitutionally unequal.

The distinction between (a) and (b) is not always clearly drawn, yet Respondent submits that two "equality" questions are presented:

- (1) The right to classify persons paying premiums on Texas risks, vel non, and
- (2) The reasonableness of the classification—admitted and unadmitted insurers.

### 3. The Jurisdiction Question

The Petitioner's Application for Writ of Error in the Texas Supreme Court assigned, among others, the following errors (R. 194, 195).

#### POINT II.

"The Court of Civil Appeals Erred in Holding that Article 21.38, Section 2, Subsection (e) of the Texas Insurance Code is Unconstitutional as a Violation of Due Process, Section 19, Article I of the Texas Constitution.

## POINT IV.

"The Court of Civil Appeals Erred in Failing to pass on and in Failing to Hold that Article 21.38, Section 2, Subsection (e) of the Texas Insurance Code is Constitutional and Not a Violation of the Equality and Uniformity Clauses of the Texas Constitution, Sections 1 and 2, Article VIII."

The Trial Court judgment did not specify the grounds of unconstitutionality supporting the judgment. The Court of Civil Appeals (R. 187) recognized the grounds to be:

"It is the contention of appellee that Sec. 2(e), Art. 21.38, *supra*, is violative of the 'due process' clauses of the Constitution of the United States and Texas (Sec. 1, 14th Amendment, Art. 1, Sec. 19, respectively, Vernon's Ann. St.) and of the 'equality and uniformity' clause of the Texas Constitution (Secs. 1 and 2, Art. 8), and the equal protection clause of the United States Constitution (Sec. 1, 14th Amendment)."

Although the Texas Supreme Court stated in a per curiam opinion that the case was controlled by *St. Louis Cotton Compress*, 260 U.S. 346, the court, nevertheless, refused the writ with the notation "No Reversible Error" (R. 242).

The refusal with the notation "No Reversible Error" means the Supreme Court recognizes that the Court of Civil Appeals has reached a correct result, but the Supreme Court does not necessarily approve the principle of law upon which the decision was based (The Federal Due Process Point). *Texas Rules of Civil Procedure No. 483*, *Texas Osage Cooperative Royalty Pool v. Clark*, 159 Tex. 441, 322 S.W. 2d 506; *Bridges v. City of Richardson*,

—Tex.—, —S.W. 2d— (decided Jan. 31, 1962). Therefore, the highest Texas court did not expressly approve the basis of decision in the Court of Civil Appeals and deliberately refused to limit the ground for the writ refusal to the federal questions.

On the other hand, an "unqualified" refusal of the writ would have approved the holding and opinion of the Court of Civil Appeals as a correct statement of the law and controlling principles, T.R.C.P. No. 483, *Agnew v. Coleman County Electric Coop.*, 153 Tex. 587, 272 S.W. 2d 877; *Bridges v. City of Richardson*, —Tex.—, —S.W.— 2d— (decided Jan. 31, 1962). Since the writ refusal was not "unqualified", the Court of Civil Appeals' opinion does not establish the grounds for the state judgment.

Petitioner's Point II in the Texas Supreme Court assigned as error the holding that the statute was unconstitutional under the Texas due process clause, and Point IV assigned as error the failure to hold the statute was not unconstitutional under the Texas Uniformity and Equality Clauses.

Petitioner's Point II admits the Court of Civil Appeals and the Trial Court holding is grounded on an adequate state ground, to-wit: Texas Due Process. Since the judgments in the appellate court simply affirm the trial court judgment which may have been based on adequate state grounds, the refusal of the Writ in the Texas Supreme Court may have also been on this adequate state ground.

Petitioner also admits the Texas and United States due process clauses are coextensive in the Application for Writ of Error (R. 195)

"The Petitioners' first two points of error will be discussed here because, fundamentally, the same issues are involved. In this connection, it is observed that

it has been held that Article I, Section 19 of the Texas Constitution restricts the powers of the Legislature to the same extent as the due process clause of Section 1 of the 14th Amendment of the United States Constitution. *Mellinger v. City of Houston*, 68 Tex. 37, 3 S.W. 239."

After admitting that the Texas and Federal Due Process clauses are coextensive, Petitioners could not now, in good grace, deny the Texas courts may have also held that Texas due process also condemns the tax.

The refusal with the notation "No Reversible Error" does not disclose the basis for refusal and does not negative the two adequate state grounds, but the notation deliberately announces the lower court opinion is not approved nor adopted. Thus, the refusal may have been based on adequate state ground, to-wit: (1) the Texas Due Process Clause or the Texas Equality and Uniformity Clauses.

The controlling jurisdictional principle is now well settled by *Durley v. Mayo*, 351 U.S. 277, as follows:

"It is a well established principle of this Court that before we will review a decision of a state court it must *affirmatively appear* from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the case . . . And where the decision of the state court *might* have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it" (Emphasis added)

This Court cannot know but may only guess as to the meaning of the notation, N.R.E. A guess, even though educated, is not a sufficient basis for the assumption of jurisdiction.

Since the Texas Supreme Court rendered no complete opinion and its judgment (Refusal of the Writ with the notation "No Reversible Error") *might* have also rested on the Texas Constitution's Due Process and Equality and Uniformity Clauses, this court should not take jurisdiction.

In *Stembridge v. Georgia*, 343 U.S. 541, the rule is stated:

"We are without jurisdiction when the question of the existence of an adequate state ground is debatable."

Since (1) Petitioners assigned as error in the Texas Application for Writ an adverse holding on the Texas Due Process and Equality and Uniformity points, (2) the Texas Supreme Court carefully avoided limiting itself to one ground for refusal by the notation "No Reversible Error", and thereby also deliberately declined to limit itself to the grounds announced by the Court of Civil Appeals for affirmance, and (3) the affirmed Trial Court judgment does not specify a state or federal ground, the existence of an adequate state ground is clearly debatable.

The purpose of the Supreme Court's per curiam opinion (R 242) was to renounce the lower court's prophecy that *St. Louis Compress* would be overruled (R. 190-191) and to further admonish the lower Texas Court that prophecy belongs to the theologians and inspired poets rather than the judiciary. The purpose of the notation—N.R.E.—was probably to avoid limiting the refusal to the one federal ground specified in the opinion (R. 183-191).

The record does not affirmatively demonstrate that the Federal Due Process question was necessary to a determination of the case. The Texas decision may have been grounded on the Texas Due Process and Equality points, either of which is sufficient to sustain the judgment.



## CONCLUSION

(1) The Texas unadmitted insurance tax should be held to be an unconstitutional violation of due process and equal protection

(2) *St. Louis Compress* should be reaffirmed.

(3) The state court judgment should be affirmed.

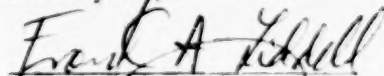
(4) Alternatively, the Petition for Certiorari should be dismissed for want of jurisdiction.

(5) Alternatively, the case should be remanded to the Texas courts for determination of the Texas Constitutional questions presented.

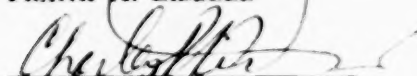
Respectfully submitted,



HARRY G. HILL  
177 Montague St.  
Brooklyn 1, New York



FRANK A. LIDDELL



CHARLES R. VICKERY, JR.  
510 Gulf Building  
Houston 2, Texas

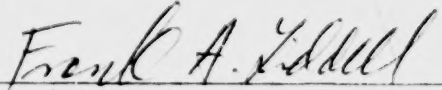
Of Counsel:

CULLEN and DYKMAN  
177 Montague Street  
Brooklyn, New York

LIDDELL, AUSTIN, DAWSON  
& SAPP  
510 Gulf Bldg.  
Houston 2, Texas

**CERTIFICATE OF SERVICE**

A copy of this Brief for Respondent has been served pursuant to Supreme Court Rule No. 33 by depositing five copies of the Brief in a United States Mail Box, with first class postage prepaid, addressed to counsel of record for the Petitioner at his Post Office Address, Capitol Station, Austin 11, Texas.

  
\_\_\_\_\_  
Frank A. Liddell

Office Supreme Court, U.S.  
FILED

FEB 20 1962

JOHN F. DAVIS, CLERK

---

IS THE  
**Supreme Court of the United States**

October Term, 1961

---

No. 144

---

STATE BOARD OF INSURANCE, Et AL.,  
v. *Petitioners,*  
TODD SHIPYARDS CORPORATION,  
*Respondent.*

---

**On Writ of Certiorari to the Court of Civil Appeals  
of Texas, Third Supreme Judicial District, Sitting  
in Austin, Texas**

---

**BRIEF FOR THE CHURCH FIRE INSURANCE  
CORPORATION AND THE CATHOLIC RELIEF  
INSURANCE COMPANY OF AMERICA AS  
*AMICI CURIAE***

---

CLOYD LAPORTE,  
JOHN MASON HARDING,  
40 Wall Street,  
New York 5, New York.  
*Attorneys for The Church Fire  
Insurance Corporation and The  
Catholic Relief Insurance Com-  
pany of America as amici curiae.*

DEWEY, BALLANTINE, PUSBY,  
PALMER & WOOD,  
40 Wall Street,  
New York 5, New York.  
*Of Counsel.*

---

---

## TABLE OF CONTENTS

	Page
Table of Authorities .....	ii
The Interest of the <i>Amici Curiae</i> .....	1
Summary of Argument .....	6
Argument .....	10
Introductory statement concerning the role of the due process clause in state regulation and taxation of insurance .....	10
A. The insurance transactions involved in this case take place entirely outside Texas; there is no local insurance activity over which Texas may exercise its jurisdiction to tax or regulate .....	14
B. The Texas premium tax is a tax and not a regulation .....	17
C. The Texas premium tax is invalid under <i>Connecticut General Life Insurance Co. v.</i> <i>Johnson</i> as a tax on insurance transactions out- side Texas for which Texas provides no serv- ices or benefits .....	22
D. Even if treated as a regulation, the Texas premium tax is invalid as an attempt to regu- late insurance transactions outside Texas; the tax is not reasonably directed to the protection of any interest of Texas in the insurance trans- actions here involved .....	27
Conclusion .....	33
Exhibit A—Article 21.38 of the Texas Insurance Code .....	A-1
Certificate of Service .....	A-10

## Table of Authorities

	Page
CASES	
<i>Allgeyer v. Louisiana</i> , 165 U. S. 578 (1897) —	6, 8, 9, 10, 12, 13, 27, 28, 29, 33
<i>Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue</i> , 275 U. S. 87 (1927) —	8, 10, 27, 29, 33
<i>Connecticut General Life Insurance Co. v. Johnson</i> , 303 U. S. 77 (1938) —	6, 7, 12, 13, 22, 25
<i>Equitable Life Assurance Society v. Pennsylvania</i> , 238 U. S. 143 (1915) —	25
<i>FTC v. Travelers Health Ass'n</i> , 362 U. S. 293 (1960) —	30
<i>Fidelity &amp; Deposit Co. v. Tafoya</i> , 270 U. S. 426 (1926) —	8, 10, 27, 29, 33
<i>General Trading Co. v. State Tax Commission</i> , 322 U. S. 335 (1944) —	26
<i>Hoopston Canning Co. v. Cullen</i> , 318 U. S. 313 (1943) —	8, 9, 10, 28, 29, 30, 33
<i>McLeod v. J. E. Dilworth Co.</i> , 322 U. S. 327 (1944) —	26
<i>Miller Brothers Co. v. Maryland</i> , 347 U. S. 340 (1954) —	26
<i>New York Life Insurance Co. v. Deer Lodge County</i> , 231 U. S. 495 (1913) —	11
<i>Osborn v. Ozlin</i> , 310 U. S. 53 (1940) —	8, 9, 10, 28, 29, 30, 33
<i>Paul v. Virginia</i> , 75 U. S. (8 Wall.) 168 (1869) —	11
<i>Prudential Insurance Co. v. Benjamin</i> , 328 U. S. 408 (1946) —	12
<i>St. Louis Cotton Compress Co. v. Arkansas</i> , 260 U. S. 346 (1922) —	6, 8, 10, 12, 13, 27, 28, 29, 33

	Page
<i>Scripto, Inc. v. Carson</i> , 362 U. S. 207 (1960) .....	26
<i>Travelers Health Ass'n v. Virginia</i> , 339 U. S. 643 (1950) .....	28
<i>United States v. South-Eastern Underwriters Ass'n</i> , 322 U. S. 533 (1944) .....	6, 11, 12
<i>Watson v. Employers Liability Assurance Corp.</i> , 348 U. S. 66 (1954) .....	28
<i>Wisconsin v. J. C. Penney Co.</i> , 311 U. S. 435 (1940) .....	25

#### FEDERAL STATUTES

McCarran Act, 59 Stat. 33 (1945), 15 U. S. C. §§ 1011-1015 (1958) .....	6, 11, 12, 30
--	---------------

#### TEXAS CONSTITUTION

Article 7, Section 3 .....	21
----------------------------	----

#### TEXAS STATUTES

Texas Insurance Code, Article 21.02 .....	18
Texas Insurance Code, Article 21.38 (set out in full in Exhibit A) .....	17, 18, 19, 20, 21, 24
Texas Penal Code, Article 570 .....	18
Laws of Texas, Chap. 36, Spec. Sess. (1879) .....	18
Laws of Texas, Chap. 617, 51st Reg. Sess. (1949) .....	18, 21
Laws of Texas, Chap. 395, 55th Reg. Sess. (1957) .....	18, 21

#### OTHER AUTHORITIES

Best's Insurance Reports, Fire and Casualty, 1961 .....	4
H. R. Rep. No. 143, 79th Cong., 1st Sess. (1945) .....	12

IN THE  
**Supreme Court of the United States**

October Term, 1961

---

No. 144

---

STATE BOARD OF INSURANCE, ET AL.,  
*Petitioners,*  
v.

TODD SHIPYARDS CORPORATION,  
*Respondent.*

---

On Writ of Certiorari to the Court of Civil Appeals  
of Texas, Third Supreme Judicial District, Sitting  
in Austin, Texas

---

**BRIEF FOR THE CHURCH FIRE INSURANCE  
CORPORATION AND THE CATHOLIC RELIEF  
INSURANCE COMPANY OF AMERICA AS  
*AMICI CURIAE***

---

**The Interest of the *Amici Curiae***

The Church Fire Insurance Corporation and The Catholic Relief Insurance Company of America, with the consent of both parties, submit this brief as *amici curiae* in support of the respondent, Todd Shipyards Corporation.

The present case constitutes, so far as is known, the most extreme attempt by a state to regulate or tax insur-

ance transactions beyond its jurisdiction that has been presented for review by this Court in recent years. Texas here in effect claims that the presence within its borders of property insured elsewhere subjects all aspects of the insurance of that property to its regulatory and taxing jurisdiction. Prior decisions of this Court clearly render this claim invalid under the due process clause, as the courts below recognized. Texas concedes that its claim of jurisdiction is unfounded under those decisions, but asks the Court to reconsider those decisions and to overrule them.

For the Court to do so would violate settled and established constitutional principles, as will be shown below, and would have grave repercussions on the operation of the insurance industry under the present system of state regulation and taxation of insurance, with serious consequences for The Church Fire Insurance Corporation and for The Catholic Relief Insurance Company of America.

The Church Fire Insurance Corporation is a New York fire insurance corporation with its principal office in New York. It is subject to the New York Insurance Law, submits annual reports to the New York Insurance Department and is periodically examined by the New York Insurance Department as required by statute. Church Fire is a non-profit corporation, all of its stock being owned by The Church Pension Fund, the pension system for the clergy of the Protestant Episcopal Church. Since its incorporation in 1929, Church Fire has limited its business to that for which it was organized, namely, the insurance of churches and other property of the Protestant Episcopal Church and



affiliated organizations against fire and allied hazards.\* Its insurance rates, together with a method of installment payment of premiums, result in savings on the insurance of church properties in excess of 27% over standard commercial rates. Church Fire has no agency system, but conducts its business principally by direct dealings, in person and by mail, between its representatives in New York and church officials of the individual dioceses and parishes desiring insurance.

The operation of The Catholic Relief Insurance Company of America parallels that of Church Fire, The Catholic Relief Insurance Company providing insurance for the properties of the Roman Catholic Church. The Catholic Relief Insurance Company is a Nebraska insurance corporation with its headquarters in Omaha. It is subject to the Nebraska Insurance Law, submits annual reports to the Nebraska Insurance Department and is periodically examined by the Nebraska Insurance Department. It is a non-profit corporation, all of its stock being owned by The Catholic Mutual Relief Society of America, a religious and benevolent society organized in 1889 and incorporated under the laws of Nebraska in 1896 for the purpose of providing relief for organizations of the Roman Catholic Church in the event of a disaster or calamity involving their properties. In accordance with its Articles of Incorporation, The Catholic Relief Insurance Com-

---

\* Article IV of the Charter of Church Fire provides that

"... it is the intention that the Corporation shall confine itself to insurance on churches, rectories, schools, hospitals and all kinds of buildings, household furniture and other property of the Protestant Episcopal Church, its dioceses, parishes or other organizations of the said Church, or of any corporations or associations affiliated therewith, or any property owned, or held by any person, association or corporation and used to promote the interests of the Protestant Episcopal Church."

pany has confined its business to the insurance of properties owned by the Roman Catholic Church, principally to fire and casualty insurance (the Company is not permitted by its Articles of Incorporation to write life insurance).<sup>\*</sup> It has no agency system, and, as in the case of Church Fire, provides insurance for church property at substantial savings over standard commercial rates.

The amount of insurance business done by Church Fire and The Catholic Relief Insurance Company is of necessity limited by the size of the Protestant Episcopal Church and the Roman Catholic Church and the amount of property owned by their component organizations.

In addition to being licensed in New York, Church Fire in 1960 was licensed as a foreign insurer in twenty-three states (including Texas) where the volume of business done and the scope of its activities have made qualification appropriate. In addition it issues policies covering church properties in each of the remaining twenty-six states in which it is not licensed. Its premium income from those twenty-six states in 1960 ranged from \$35,666.33 from Missouri and \$27,797.24 from Kentucky on down to \$504.80 from Hawaii and \$16.24 from Alaska.<sup>\*\*</sup> The Catholic Relief Insur-

---

<sup>\*</sup> Article III of the Articles of Incorporation of The Catholic Relief Insurance Company provides that the Company's contracts of insurance shall be limited to "Members of the Catholic Mutual Relief Society of America and the properties or affairs or interests under their charge or administration." Only Ordinaries of Dioceses (the Archbishops and Bishops thereof) and Superiors of Religious Orders in the Hierarchy of the Roman Catholic Church may be members of The Catholic Mutual Relief Society of America.

<sup>\*\*</sup>Annual Statement of Church Fire to the New York Insurance Department, 1960. Portions of the Annual Statements of Church Fire are set out in the published Annual Reports of the New York Superintendent of Insurance. Additional information concerning Church Fire and The Catholic Relief Insurance Company is contained in Best's Insurance Reports, Fire and Casualty, 1961, pp. 222, 241.

ance Company is licensed to do business only in Nebraska. Although it writes insurance covering church properties in 167 dioceses and religious orders in thirty-two states (including Nebraska), the volume of its business and the scope of its activities have not as yet been sufficient to warrant qualification as a foreign insurer in any state. Its premium income in 1961 from states other than Nebraska ranged from \$27,946.58 from California to \$24.01 from West Virginia.\*

It is not unrealistic to expect that the states in which Church Fire and The Catholic Relief Insurance Company are not now licensed would be quick to exercise additional taxing and regulatory powers granted to them as the result of a decision in favor of Texas in this case. Church Fire and The Catholic Relief Insurance Company could not afford to continue issuing policies on church properties in these states on the basis of their present premium income if they are subjected to the jurisdiction of these states solely because of the presence in the states of the risks insured. The payment of additional taxes would be an initial burden, and compliance with regulatory requirements an even greater burden, involving the submission and approval of policy forms, filing of annual reports and ascertaining and complying with the states' substantive requirements.

Because of the limited number of church properties in these states and the consequent limits on any increase in the volume of insurance, the practical effect of subjecting Church Fire and The Catholic Relief Insurance Company to the jurisdiction of these states would be to prevent Church Fire and The Catholic Relief Insurance Company for the foreseeable future from writing

---

\* Annual Statement of The Catholic Relief Insurance Company to the Nebraska Insurance Department, 1961.

insurance on church properties located there, to the cost of the dioceses, parishes and religious orders in those states.

Church Fire and The Catholic Relief Insurance Company therefore submit this brief to ask the Court not to overturn the established constitutional principles which prohibit a state from taxing or regulating out-of-state insurance transactions solely on the basis of the physical presence of the insured property in the state.

### Summary of Argument

The due process clause prohibits Texas from taxing or regulating insurance transactions outside Texas.

The due process clause plays an essential role in the system of state regulation and taxation of insurance. It has in effect served as the arbiter of the system, protecting individual insurance transactions against overreaching by individual states and militating against conflicting regulation and multiple taxation, both before and after the decision of this Court in *United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533 (1944), when this Court for the first time held that insurance was "commerce." Indeed, when Congress after that decision expressed its desire by the McCarran Act that the regulation and taxation of insurance continue to be left to the states without impediment from the commerce clause, Congress indicated its reliance on the due process clause as the means by which the states would continue to be confined within the bounds of their proper legislative concern over local interests, referring specifically to this Court's decisions in *Allgeyer v. Louisiana*, 165 U. S. 578 (1897), *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346 (1922), and *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77 (1938). To overrule these cases, as Texas

asks here, would be vastly to expand the authority of every state with which an insurance transaction has any connection, thereby substantially increasing the risks of conflicting regulation and multiple taxation, with adverse consequences for the insurance industry and for the system of state regulation and taxation of insurance.

The insurance transactions involved in this case take place entirely outside Texas. The insurance, which is principally insurance against loss or liability arising from damage to property, is negotiated and paid for outside Texas. The policies are issued outside Texas. All losses arising under the policies are adjusted and paid outside Texas. The insurers are not licensed to do business in Texas, have no office or place of business in Texas, do not solicit business in Texas, have no agents in Texas, and do not investigate risks or claims in Texas.

The insured is not a resident of Texas but a New York corporation doing business in Texas. Losses under the policies are payable not to Texas residents but to the insured at its principal office in New York. The only connection between Texas and the insurance transactions is the fact that the property covered by the insurance is physically located in Texas.

The 5% premium tax is a tax and not a regulation. It was enacted for the purpose of making insurance purchased from non-licensed insurers otherwise than through a Texas insurance agent subject to the same tax as that imposed on insurance purchased from non-licensed insurers through Texas insurance agents, and has no regulatory purpose or function.

Treated as a tax, it is invalid under *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77

(1938), where this Court ruled invalid a California tax on premiums paid in Connecticut for reinsurance of life insurance policies covering California residents, notwithstanding that the insurance companies involved were licensed in California. The Texas tax here is not imposed on Todd's Texas property, nor on Todd's activities in Texas, nor on Todd's privilege of doing business in Texas, but is imposed on Todd's activities in New York, namely, on the payment by Todd in New York of insurance premiums in the course of New York insurance transactions. The due process clause denies Texas the power to exact a tax from insurance transactions outside its borders for which it provides no services or benefits.

Treated as a regulation, the tax is clearly invalid, as the courts below held, under *Allgeyer v. Louisiana*, 165 U. S. 578 (1897), *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346 (1922), *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426 (1926), and *Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U. S. 87 (1927). The petitioners in effect concede the invalidity of the Texas tax under these cases, but argue that they have been overruled by implication by such cases as *Osborn v. Ozlin*, 310 U. S. 53 (1940) and *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313 (1943), and should now be expressly overruled.

It is not disputed that these cases differ in approach. The *Allgeyer* case looked to the making of the insurance contract as the significant event in an insurance transaction and invalidated state regulation of insurance contracted for outside the state as an interference with liberty of contract. The *St. Louis Cotton Compress Co.*, *Fidelity & Deposit Co.* and *Compañía* cases fol-

lowed *Allgeyer* twenty-five years later, but invalidated the state statutes involved on the basis of the principle that a state may not regulate activities outside its borders without repeating the emphasis of *Allgeyer* on liberty of contract. *Osborn v. Ozlin* and *Hoopston Canning Co. v. Cullen*, within the framework of the due process limitations on a state's jurisdiction, looked to the aspects of the insurance transaction taken as a whole having contacts with the state, and to the relationship of the regulation involved to the state's interest in those aspects of the insurance transaction which were within the state.

The difference in approach, however, does not produce a difference in result. The same result would be reached in the four earlier cases under the approach of the two later cases. In the earlier cases, there was no significant connection between the state and the insurance transactions other than the presence of the insured property within the state. In each of the later cases, there were significant insurance activities in the state in addition to the presence of the insured property in the state.

In the present case there are no insurance activities in the state at all. The insurance transactions regarded as a whole take place entirely outside the state, and the physical presence of the insured property in the state is the only connection between the insurance transactions and the state. Texas has only a minimal interest in the insurance of Todd's Texas property; the consequences of inadequate insurance of the property fall not on Texas residents but on Todd.

In addition the 5% premium tax bears no reasonable relation as a regulatory measure to such interest as Texas may have in the insurance of Todd's Texas prop-



erty, unlike the statutes involved in *Osborn v. Ozlin* and *Hoopeston Canning Co. v. Cullen*, which were affirmative regulatory measures directed to specific state interests in insurance activities within the state. Texas does not require Todd to carry any of the insurance involved here; only if Todd chooses to insure is the tax imposed. If Todd places its insurance with non-licensed insurers, a 5% tax is imposed whether or not Todd deals through a licensed Texas agent. The Texas tax cannot realistically be said to control or to "regulate" in any way the placing of insurance with non-licensed insurers.

Thus, the insurance activities sought to be taxed take place wholly outside Texas; Texas has at best a minimal interest in the insurance of the property, the presence of which in Texas is Texas' sole connection with the insurance transactions; and the tax itself is not reasonably directed to the regulation of whatever interest Texas may have in the insurance of the property. The tax is therefore invalid as a regulation under *Osborn v. Ozlin* and *Hoopeston Canning Co. v. Cullen* as well as under *Allgeyer v. Louisiana*, *St. Louis Cotton Compress Co. v. Arkansas*, *Fidelity & Deposit Co. v. Tafoya*, and *Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue*.

## ARGUMENT

### Introductory Statement Concerning the Role of the Due Process Clause in State Regulation and Taxation of Insurance

The regulation of insurance in the United States has traditionally been and remains regulation by the



states, which over the years have evolved a network of individual state regulatory and taxing schemes across the country. The system has on the whole been a workable one, satisfactory to the insurance industry, to the states and to the federal government. The insurance industry has grown and expanded to fulfill the social functions it serves under that system, and the present structure and organization of the industry is based on it. The due process clause has been essential to the functioning of the system.

The system developed principally during the years in which the business of insurance was held under decisions of this Court not to be "commerce" and therefore not subject to federal control.\* During this period, the only factor which confined the states within the bounds of their proper legislative concern over local interests was the enforcement under the due process clause of the fundamental limits on the legislative jurisdiction of the individual states. The due process clause in effect served as arbiter of the system of state regulation and taxation of insurance, protecting individual insurance transactions against overreaching by individual states and militating against conflicting regulation and multiple taxation.

When insurance was held to be commerce in 1944 in *United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533, Congress promptly expressed its desire, by the enactment of the McCarran Act, 59 Stat. 33, 15 U. S. C. §§ 1011-1015 (1945), that the regulation and taxation of insurance continue to be left to the states

---

\* E.g., *New York Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495 (1913); *Paul v. Virginia*, 75 U. S. (8 Wall.) 168 (1869).

without impediment from the commerce clause.\* At the same time, however, Congress indicated its reliance on the due process clause as the means by which the states would continue to be prevented from asserting jurisdiction over matters beyond their legitimate legislative concern, referring to decisions of this Court invalidating attempts by a state to regulate or tax insurance transactions in which the state had only a minimal interest. Congress referred specifically to *Allgeyer v. Louisiana*, 165 U. S. 578 (1897), *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346 (1922) and *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77 (1938).\*\*

\* "Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U. S. C. § 1011.

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, . . . the Sherman Act, and . . . the Clayton Act, and . . . the Federal Trade Commission Act . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U. S. C. § 1012.

The continued taxation and regulation by the states of interstate insurance transactions under the McCarran Act was upheld in *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408 (1946).

\*\* The Report of the House Judiciary Committee stated:

"It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association case*. Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the States, subject always, however, to the limitations set out in

To overrule these cases, as Texas asks here, would be vastly to expand the authority of every state with which an insurance transaction has any connection, substantially increasing the risks of conflicting regulation and multiple taxation and jeopardizing the functioning of the system of state regulation and taxation. If the Texas tax at issue here is upheld, no insurance policy could thereafter be issued covering a risk in any state without subjecting the entire insurance transaction to the taxing and regulatory jurisdiction of that state, regardless of the degree of the state's interest in the transaction apart from the presence of the insured property, or the extent to which the transaction might already be subject to the regulations and taxes of another state with a more substantial interest. An insurance policy insuring goods against loss in transit, for example, would be subject to regulation and taxation by each state through which the goods passed.

The consequences of such a result would fall particularly heavily on the small insurance company. As noted above, Church Fire and The Catholic Relief Insurance Company would not be able to support the heavy burden of ascertaining and complying with the requirements of the states in which they are not now licensed, and would be effectively precluded from continuing to write insurance on church properties in those states. The growth and development of other small insurance companies not limited as are Church Fire and The Catholic Relief Insurance Company in their potential for expansion would be seriously restricted by the

---

the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer v. Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co. v. Arkansas* (260 U. S. 346), and *Connecticut General Insurance Co. v. Johnson* (303 U. S. 77). . . ." H. R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945).

burden of such compliance. The large insurance companies which are licensed and active in all fifty states would thereby receive a further competitive advantage in addition to those they already possess by virtue of their size.

The operation of even the large insurance companies would be significantly hampered in being required to comply with the laws of all the states with which any given insurance transaction might have any connection.

• To permit a state to regulate or tax all aspects of an insurance transaction solely on the basis of the physical presence in the state of the insured property would go far beyond what has heretofore been permitted to an individual state in the federal system, and far beyond what has heretofore been thought necessary to enable an individual state to protect its legitimate local interests. To abandon the limits on a state's legislative jurisdiction heretofore enforced under the due process clause, and on which the system of state regulation and taxation of insurance has in large part depended, would have adverse consequences for the insurance industry and the system of state regulation and taxation of insurance.

- A. The insurance transactions involved in this case take place entirely outside Texas; there is no local insurance activity over which Texas may exercise its jurisdiction to tax or regulate.**

The insurance premiums over which Texas asserts its jurisdiction in this case are insurance premiums paid outside Texas as part of insurance transactions conducted between the insurer and the insured entirely outside Texas.

Todd Shipyards Corporation is a New York corporation with its principal office, principal place of busi-

ness and domicile in New York. It conducts its shipyard business in New York and a number of other states, including Texas, where it has been duly qualified to do business as a foreign corporation since 1934. (R. 44, 46, 158-60.)

The insurance on Todd's business and properties is managed by its insurance and claims manager in New York, who decides all matters relating to the purchase and renewal of Todd's insurance, including the type and amount of coverage and the selection of the insurers. (R. 45, 160, 164-65.)

The particular insurance involved here provides coverage primarily for loss from physical damage to Todd's property, or from liability by Todd for physical damage to the property of others in Todd's custody, at its shipyards in Louisiana, New Jersey, New York and Texas.\* (R. 47, 161-62.) It is negotiated by Todd in New York with two English insurers, Lloyds of London and The Institute of London Underwriters, principally through three New York insurance brokers, Johnson & Higgins, Griswold & Company and Marsh & McLennan, Inc. (R. 44-45, 48, 162-64, 177.) The insurance premiums are paid by Todd's New York office to the brokers in New York; the insurance policies are physically signed and issued by the insurers in London and are accepted by Todd in New York; the policies state that as between the insured and the insurer New York may be considered as the place of issue, at the option of

---

\* Some of the policies included in the Record relate solely to Texas property (*e.g.*, Item 2a of Ex. B, R. 64), while others relate to property in Louisiana, New Jersey, New York and Texas (*e.g.*, Item 1a of Ex. B, R. 52). The only other type of insurance involved is excess product liability insurance, an initial amount of coverage being carried with an insurer licensed in Texas and coverage in excess of such amount being carried with the English insurers (Item 5a of Ex. B, R. 92; Item 6b of Ex. B, R. 102; R. 139).

the insured. (R. 45, 48-49, 169.) Renewals of the insurance policies are negotiated and agreed upon in New York between Todd's New York office and the New York brokers. (R. 48-49, 169-70.)

In the event of a loss at Todd's Texas properties, Todd's officials in Texas inform Todd's insurance manager in New York, who notifies the New York broker. (R. 49, 165.) An independent appraiser is then appointed in New York to survey the damage, and the appraiser physically inspects the loss in Texas, with the assistance of Todd's representatives in Texas. (R. 49, 166-67.) The appraiser submits a report of its findings as to the dollar amount of the damage to Todd in New York. (R. 49, 166-67.) The appraiser's fees for its services are paid by Todd in New York. (R. 49.) The extent to which the loss is covered by the policies is thereafter adjusted in New York between Todd and the insurance companies through the New York brokers. (R. 45, 49-50, 166-68, 173-74.) All losses are paid by the insurers to Todd in New York. (R. 45, 170.)

Todd's Texas offices do not correspond or conduct any negotiations or transactions directly or indirectly with the insurers or the New York brokers. (R. 45, 164-65, 168-69.) Neither of the English insurers has an office or agent in Texas or is licensed to write insurance in Texas. (R. 47.) Neither insurer has ever solicited Todd's insurance business or policies within Texas. (R. 45.) The nature of the insurance is such that the insurers make no inspection of the properties before issuing their policies (R. 164), and the insurers do not conduct any investigation of claims in Texas. (R. 45.) None of the brokers through whom the insurance is negotiated is licensed as an insurance agent in Texas; all three of the principal brokers are licensed New York

insurance brokers and are licensed to place the insurance of the two English insurers. (R. 48, 140.)

Thus, not only does the payment of the insurance premiums that Texas seeks to tax take place in New York, but the entire series of acts which collectively make up the insurance transactions as a whole take place altogether outside of Texas: no act in the negotiation of the policies, the payment of premiums or the adjustment of losses occurs in Texas. The only connection between the insurance transactions and Texas is the fact that the risks being insured are physically located in Texas.\*

As will be shown below, the presence of the insured property in Texas alone is not a sufficient basis under the due process clause to support the taxation or regulation by Texas of what are essentially New York insurance transactions.

#### **B. The Texas premium tax is a tax and not a regulation.**

The petitioners' brief treats the 5% premium tax imposed by Article 21.38 of the Texas Insurance Code only as a regulation, apparently conceding its invalidity as a tax. The tax, however, was clearly intended by

---

\* The fact that Todd is qualified to do business in Texas has no bearing on the present case, since the tax is imposed on all premiums paid to unauthorized insurers, and would accordingly be imposed on Todd whether or not Todd is qualified to do business as a foreign corporation. The only other Texas activity which could remotely be argued as being involved in the insurance transactions is the physical inspection of loss damage in Texas by an independent appraiser in conjunction with Todd representatives. (R. 166-67.) The making of such inspection in Texas, however, is only an incidental by-product of the fact that Todd's property is physically located there. The inspection is an initial step in the process by which Todd in New York acquires information with which to furnish proof of the loss to the insurers in New York (the insurance policies themselves make no provision as to what constitutes satisfactory proof of loss, R. 52-132). The report based on the physical inspection is submitted to Todd in New York and is paid for by Todd in New York. The actual adjustment of the loss is made entirely in New York between Todd and the insurers through the New York brokers.



Texas as a tax, operates as a tax and has been treated by Texas as a tax.\*

*The Texas Legislature enacted the premium tax as a tax.* The 5% premium tax at issue here was enacted in 1957 as a tax for the purpose of supplementing an existing 5% tax already imposed on premiums for so-called "surplus" insurance covering Texas risks purchased from non-licensed insurers through licensed Texas agents. In Section 7 of the 1957 amending statute (Chap. 395, 55th Reg. Sess., 1957), the Texas Legislature stated that the reason for the tax was

"The fact that the present laws relating to the placement of surplus lines of insurance do not provide adequately for the conditions under which it shall be placed with unauthorized insurers *in a manner which will insure the collection of the tax levied upon the premiums charged or paid for such insurance. . . .*" (Emphasis added.)

This authoritative legislative statement in the amending act itself that the tax was enacted as a tax is confirmed by the prior history of Article 21.38.

*History of Article 21.38 of the Texas Insurance Code.* Article 21.38 was originally enacted in 1949 (Chap. 617, 51st Reg. Sess., 1949).\*\* Prior to 1949, and since 1879, Texas insurance agents had been prohibited from placing insurance with an insurer not licensed in Texas, on penalty of a fine of up to \$1,000 and personal liability to the insured under the policies.\*\*\* Hence,

---

\* Article 21.38 of the Texas Insurance Code is set out in full as Exhibit A of this brief.

\*\* The substantive provisions of the 1949 statute became the present Article 21.38 without change in the 1951 recodification of the Texas Insurance Code.

\*\*\* General Laws, Chap. 36, Spec. Sess. (1879). These provisions are now contained in Article 570 of the Texas Penal Code and Article 21.02 of the Texas Insurance Code.



prior to 1949 an agent with a customer desiring coverage for a particularly large risk in Texas could negotiate only for that amount of coverage available from insurers licensed in Texas; the customer would then have to obtain the excess insurance by some other means. The 1949 enactment of what is now Article 21.38 authorized licensed Texas insurance agents to place with non-licensed insurers "excess" or "surplus" insurance, *i.e.*, insurance not available from insurers licensed in Texas, on payment of a \$25 fee and filing of a \$5,000 bond. A tax was imposed of 5% of the premiums paid for excess insurance so purchased through a licensed Texas agent.\*

After 1949, a Texas insurance agent could thus place excess insurance covering Texas risks for his customers, subject to a tax of 5% of the premiums. Persons desiring insurance, however, were still free, as they had been before, to obtain insurance covering Texas risks from non-licensed insurers otherwise than through a Texas agent, whether or not the insurance was procurable from licensed companies. If anyone chose to obtain the insurance otherwise than through the agent the 5% tax was avoided.\*\*

The 1957 amendment added the 5% tax at issue here, which is imposed on premiums for insurance covering Texas risks purchased from non-licensed companies otherwise than through a licensed Texas agent.

---

\* The remainder of Article 21.38, not at issue in this case, provides for service of process upon non-licensed insurers in any suit arising out of an insurance policy effected by the non-licensed insurer by acts inside Texas, and for the furnishing of security by the insurer as a defendant in such a suit. Significantly, none of the acts giving rise to the insurance transactions involved here would subject the insurers to service of process in Texas in a suit on the insurance policies even under this statute.

\*\* The tax is technically imposed on the agent; the effect of the tax is to increase the cost of the insurance.

It is thus clear that the sole purpose of the addition in 1957 of the 5% premium tax at issue in this case was to supplement the existing 5% tax on excess insurance placed with non-licensed insurers through licensed Texas agents, as the Texas Legislature indicated at the time of its enactment in the passage quoted above.

The existing tax which the 1957 amendment was designed to supplement itself had no regulatory purpose or function. Placing of excess insurance with non-licensed insurers through licensed Texas agents, on which the existing tax was imposed, was already regulated by the other provisions of Article 21.38 requiring that the agent file a \$5,000 bond and that he be already regularly commissioned to represent a licensed insurer. The 5% tax on excess insurance placed through Texas agents could not have had the purpose of encouraging insurance with licensed insurers, since the only insurance on which the tax was imposed was insurance not available from licensed insurers. The 5% tax at issue here on insurance placed otherwise than through a Texas agent could not have had any more of a regulatory purpose than the tax it was intended to supplement. Nor can the 1957 amendment have been intended to discourage dealing otherwise than through a Texas agent, since the tax on the insurance purchased from non-licensed insurers is 5% whether or not purchased through a Texas agent.

That the 1957 amendment was intended only as a tax is further borne out by the fact that it added Section 2(f) to Article 21.38, providing that the 5% premium tax is imposed only on that part of the premiums paid for insurance covering risks in Texas, whether or not purchased through a Texas agent. Apportionment is the language of taxation, not regulation. Had

the 5% tax been intended as a regulation, there would be no provision for apportionment.

The petitioners' brief (pp. 7-8), in asserting that the purpose of Article 21.38 is to "regulate" the placing of insurance with non-licensed insurers, points to the statement in Section 1 of Article 21.38 that its purpose is

"... to regulate the placing of policies or contracts, effecting direct insurance, with certain non-authorized insurers, and to subject certain unauthorized insurers to the jurisdiction of courts of this State in suits by or on behalf of insureds or beneficiaries under insurance contracts. The Legislature declares that it is the subject of concern that the placing of such direct lines of insurance with unauthorized insurers is not properly regulated . . ."

Section 1, however, was the statement of the purpose of Article 21.38 at the time of its original enactment in 1949; the quoted language was already present in the statute at the time of the addition of the 5% tax at issue here in 1957. Further, the "regulation" referred to in Section 1 clearly refers to the regulatory provisions for the licensing of Texas agents to place excess insurance with non-licensed insurers (the filing of a \$5,000 bond and the requirement that he be regularly commissioned to represent a licensed insurer), and not to the 5% tax imposed on premiums paid for such insurance.

*Administrative determination of the tax as an occupation tax.* Consistent with the Legislature's intent of imposing a tax rather than a regulation, the Texas authorities have determined administratively that the 5% premium tax is an occupation tax. Article 7, Section 3 of the Texas Constitution requires one-fourth of all "occupation taxes" to be set aside for the Public

Free School Fund. Both the 5% premium tax originally imposed on excess insurance placed through licensed Texas agents and the 5% tax at issue here have been determined by the State Board of Insurance and the Comptroller of the State of Texas to be an occupation tax, and one-fourth of the proceeds of such taxes has accordingly been set aside for the Public Free School Fund. (R. 137-38.)

**C. The Texas premium tax is invalid under *Connecticut General Life Insurance Co. v. Johnson* as a tax on insurance transactions outside Texas for which Texas provides no services or benefits.**

In *Connecticut General Life Insurance Co. v. Johnson*, 303 U. S. 77 (1938), this Court held invalid under the due process clause a California tax of 2.6% on the premiums paid in Connecticut by one insurance company to another insurance company for reinsurance of life insurance policies written in California on California residents, where both insurance companies were authorized to do business in California. The Court emphasized that all the steps in the reinsurance transaction took place outside California, that the transaction in no way depended upon any privilege or authority granted by California, and that the transaction received no protection from the laws of California.

Chief Justice (then Justice) Stone for the Court said (pp. 80-82):

“... the limits of the state’s legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of

transactions within the state . . . a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. [citations omitted] . . .

"Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. [citations omitted] Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. *The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection . . .*

*"All that appellant did in effecting the reinsurance was done without the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state."* (Emphasis added.)

The facts of the present case are almost identical. Texas seeks to impose a tax on premiums paid outside Texas as part of insurance transactions which take place outside Texas for insurance on Texas risks. The conduct of the insurance transactions in New York

does not depend on any authority or privilege granted by Texas, and receives no services or benefits from the laws of Texas. The only connection between Texas and the out-of-state insurance transactions is the physical presence in Texas of the insured property.

The tax is not imposed on Todd's privilege of doing business in Texas, for Todd would be liable for the tax if it were not qualified as a foreign corporation to do business in Texas. Article 21.38 imposes the 5% tax on any person purchasing insurance from an insurer not licensed in Texas, without regard to the activities of the insured in Texas and without regard to whether the insured is a Texas resident, a foreign corporation licensed to do business in Texas, or a person altogether outside Texas. The tax is not imposed on Todd's property in Texas—the 5% tax is not payable if insurance on the same property is purchased from licensed insurers, and such property is in any event already subject to direct Texas property taxes.

While the insurers may benefit indirectly by the protection afforded by Texas to the property itself, the premium tax can in no sense be considered an exaction for the protection of the insured property: Texas' protection of the property (for which direct taxes on the property are exacted) is provided whether or not the property is insured; Texas is not put to any additional burden in protecting the property because it is covered by insurance; the premium tax is not exacted at all if the insurance is purchased from licensed insurers. Texas seeks to tax the insurance transactions themselves—the negotiation and issuance of the insurance, the payments of the insurance premiums which are the direct object of the tax, and the adjustment of losses—

all of which take place in New York and derive no benefit from services or protection provided by Texas.\*

*Connecticut General Life Insurance Co. v. Johnson* is squarely in point and is controlling on the question of the invalidity of the 5% premium tax as a tax. However, without attempting to canvass the numerous decisions of this Court dealing with state taxes, it may be helpful to analyze the present case in the context of certain of those decisions which have drawn a line between (a) state taxes on activities within the state measured by activities outside the state, and (b) state taxes on activities outside the state measured by activities outside the state, the former type of tax being valid and the latter invalid.

In *Equitable Life Assurance Society v. Pennsylvania*, 238 U. S. 143 (1915), a Pennsylvania tax of 2% on premiums paid on insurance business done within the state was held valid under the due process clause as applied to premiums physically paid outside Pennsylvania to the insurer by Pennsylvania residents. The insurance company was qualified to do business in the state, the tax was on the privilege of doing business in the state, and the premiums paid for insurance on the lives of the residents of the state were held to be the measure for the tax imposed on business done in the state. In *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435

---

\* In its only lapse from its otherwise consistent silence on the subject of the tax as a tax, the petitioners' brief (p. 15) suggests that the 5% premium tax was enacted for the purpose of equalizing the tax burden borne by licensed Texas insurers, arguing that the burden of Texas insurance regulation should be supported by taxes on non-licensed companies as well as by taxes on licensed companies. In addition to the fact that there is no evidence that the 5% premium tax was enacted for such a purpose, the insurance regulation for which petitioners would ask the non-licensed companies to pay taxes by definition does not apply to non-licensed insurers.



(1940), a Wisconsin tax on dividends paid by a corporation out of income attributable to business done within the state was held constitutional as applied to the payment of dividends outside the state by a foreign corporation, on the ground that the tax was in effect a tax on income derived from Wisconsin business, liability for which was deferred until distribution of the income by the corporation as a dividend. In these two cases the transactions upon which the tax was imposed occurred within the state, the activities outside the state being merely the measure of the tax imposed. By contrast, the insurance transactions which Texas seeks to tax in the present case are themselves entirely outside the state, as well as the payment of the premiums which is made the measure of the tax.

Similarly, the Court has distinguished between a state sales tax imposed on a sale outside the state followed by shipment of the goods into the state, holding such a tax invalid in *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327 (1944), and a state use tax imposed on the use of goods within the state following a sale of the goods outside the state, holding the latter type of tax constitutional in *General Trading Co. v. State Tax Commission*, 322 U. S. 335 (1944).\*

In the language of these cases, the presence within a state of insured property does not constitute a sufficient nexus between the state and the insurance of the property wholly outside the state to support a tax on the out-of-state insurance transactions.

---

\* The issue in these two cases arose under the commerce clause, but the Court's decision is couched in terms of state legislative jurisdiction. Other state use tax cases, such as *Miller Brothers Co. v. Maryland*, 347 U. S. 340 (1954), and *Scripto, Inc. v. Carson*, 362 U. S. 207 (1960), are directed not so much to the validity of the use tax imposed as to whether the seller of the goods may fairly be required to collect the tax, and have no bearing on the present case.



**D. Even if treated as a regulation, the Texas premium tax is invalid as an attempt to regulate insurance transactions outside Texas; the tax is not reasonably directed to the protection of any interest of Texas in the insurance transactions here involved.**

This Court has repeatedly held that the due process clause prohibits a state from regulating insurance transactions outside its borders.

In *Allgeyer v. Louisiana*, 165 U. S. 578 (1897), a Louisiana statute was held invalid which made it a misdemeanor to effect insurance on Louisiana risks with an insurance company not licensed to do business in Louisiana, where the insured had contracted in New York for an open insurance policy and thereafter mailed a letter from Louisiana to New York in accordance with the terms of the policy advising of the shipment from Louisiana of goods to be covered under the policy. In *St. Louis Cotton Compress Co. v. Arkansas*, 260 U. S. 346 (1922), an Arkansas 5% premium tax imposed under circumstances identical to those of the present case was held invalid on the ground that the imposition of a 5% tax was in the same category as the absolute prohibition held invalid in *Allgeyer v. Louisiana*. In *Fidelity & Deposit Co. v. Tafoya*, 270 U. S. 426 (1926), a New Mexico statute was held invalid which prohibited licensed insurers from paying any fee to a non-resident for obtaining or writing insurance covering New Mexico risks, where the licensed insurer made payments to agents in other states in connection with its business in New Mexico. In *Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U. S. 87 (1927), a Philippine statute was held invalid which imposed a tax of 1% on premiums paid for insurance from non-licensed insurers covering risks

in the Philippines, on the authority of *St. Louis Cotton Compress Co. v. Arkansas*.

Petitioners' brief suggests (p. 7) that these cases have in effect been overruled by more recent decisions of this Court. The petitioners point specifically to *Osborn v. Ozlin*, 310 U. S. 53 (1940), where a Virginia statute was upheld requiring policies issued by insurers licensed in Virginia covering Virginia risks to be countersigned by resident agents, and to *Hoopeston Canning Company v. Cullen*, 318 U. S. 313 (1943), in which it was held that New York could constitutionally require out-of-state insurers active in the state to obtain a license to do business in New York, and that the conditions for obtaining such a license were reasonable.\*

It is not disputed that these cases differ in their approach. The Court in *Allgeyer v. Louisiana* looked principally to the making of the insurance contract as the significant event in the insurance transaction and invalidated Louisiana's regulation of insurance contracted for outside the state as an interference with

---

\* The petitioners also point to *Travelers Health Ass'n v. Virginia*, 339 U. S. 643 (1950), where the systematic mailing of insurance policies and the solicitation of insurance business by mail from outside Virginia by a non-licensed insurer was held a sufficient basis to subject the non-licensed insurer to service of process in Virginia, and to *Watson v. Employers Liability Assurance Corp.*, 348 U. S. 66 (1954), where it was held that Louisiana could enforce its statute authorizing a direct action by an injured person directly against the insurance company providing coverage to the insured against liability to third persons for such injury, where the insurer and insured were licensed to do business in Louisiana and the petitioner was a Louisiana resident, notwithstanding a provision in the insurance contract entered into in Massachusetts prohibiting such direct suit. Neither of the two lines of cases represented by these two decisions is relevant to the present case, the first dealing with the circumstances under which it is fair to subject an out-of-state company to suit in the courts of the state, and the second dealing with the extent to which a state's courts may enforce the state's public policy in a suit between two private litigants involving local activities in which the state has an interest.

liberty of contract. Twenty-five years later the Court speaking through Justice Holmes in the *St. Louis Cotton Compress Co.* and *Fidelity & Deposit Co.* cases and through Chief Justice Taft in the *Compañía* case followed *Allgeyer v. Louisiana* on the basis of general statements that a state may not regulate activities beyond its borders, without repeating the emphasis of the *Allgeyer* opinion on the place of making of the contract or on liberty of contract under the Fourteenth Amendment. *Osborn v. Ozlin* and *Hoopeston Canning Co. v. Cullen*, within the framework of the principle that a state may not regulate activities beyond its borders, looked to the aspects of the insurance transaction taken as a whole having contacts with the state, and to the relationship of the regulation involved to the state's interest in those aspects of the insurance transaction within the state.

The difference in approach, however, does not produce a difference in result. The same result would be reached in each of the earlier four cases cited above under the approach of the two later cases. In the earlier cases, there was no connection between the state and the insurance transactions other than the presence of the insured property within the state, with the possible exception of *Allgeyer v. Louisiana*, where the only additional act in Louisiana was the mailing of a notice to New York of the shipment of goods from Louisiana covered under a policy previously entered into in New York.

In each of the later cases, there were significant insurance activities in the state in addition to the presence of the insured property in the state. In *Osborn v. Ozlin*, the insurers were licensed insurance companies doing business in the state and the regulation of the

statute involved was imposed only on licensed companies. In *Hoopeston Canning Co. v. Cullen*, the insurance involved was a form of cooperative insurance under which the insureds participated in reciprocal insurance through an attorney-in-fact; insurance applications were mailed in New York by a large number of New York insureds to the attorney-in-fact in Illinois; insurance contracts were mailed by the attorney-in-fact in Illinois to the New York insureds; representatives of the attorney-in-fact visited New York to investigate prospective risks, to advise insureds as to methods of reducing fire hazards and to investigate claims.

In the present case, as in the earlier cases, there are no insurance activities in the state at all. The insurance transactions which are the object of the claimed "regulation" here take place entirely outside the state. None of the cases cited by the petitioners casts any doubt on the fundamental proposition that a state may not regulate activities wholly outside the state. This Court recently acknowledged this fundamental proposition by implication in *FTC v. Travelers Health Ass'n*, 362 U. S. 293 (1960), in referring to constitutional doubts as to Nebraska's power to regulate extraterritorial activities even of its own domiciliary corporations, where Nebraska's prohibition against deceptive trade practices outside the state by a Nebraska domiciliary was held not to be "regulation" for purposes of ousting the Federal Trade Commission of jurisdiction over such practices under the McCarran Act.

Nor does the 5% premium tax bear any reasonable relation as a regulatory measure to the interest of Texas in the insurance of Todd's Texas property, unlike the statutes involved in *Osborn v. Ozlin* and *Hoopeston Canning Co. v. Cullen*, which were affirmative regula-

tory measures directed to specific interests of the state in insurance activities within the state.

The interest of Texas in the insurance of Todd's Texas property is presumably to see that the property is properly insured with solvent and responsible insurers, on the ground that if there are losses under the policy which are not paid by the insurers, the consequences may have repercussions on Texas interests. However, the primary beneficiary of the insurance involved in this case is Todd itself. The three categories of insurance involved here are insurance against (1) loss from physical damage to Todd's own property, (2) liability for loss from physical damage to property of others in Todd's custody, and (3) product liability in excess of the amount covered by Todd's policy with an insurer licensed in Texas. (R. 47, 51, 139). If the insurers are unsound and fail to cover losses under the policies, the loss falls initially on the Todd corporate enterprise, a New York corporation with most of its assets outside Texas, and not on Texas residents. Any possible interest of Texas is involved only in the second two categories of insurance and only in the more remote event that the insurance is not paid and Todd's assets are then insufficient to cover its liabilities.

The 5% premium tax is not reasonably directed to the protection of this minimal interest of Texas in the insurance of Todd's Texas property. Texas does not require Todd to carry any of the insurance on which the tax is sought to be imposed here. Only if Todd chooses to insure is the tax imposed. Indeed, as to the "excess" insurance, or insurance not available from insurers licensed in Texas, the effect of the 5% tax on premiums paid to unauthorized insurers, if any, is to discourage taking out the insurance.

Further, the tax is indiscriminately imposed on all insurance placed with unauthorized insurers, without distinction between life insurance, fire insurance or casualty insurance, without regard to whether the insured or the beneficiary of the insurance is a Texas resident, a foreign corporation, or a natural or corporate person, and without regard to whether the unauthorized insurer is financially responsible or subject to regulation by other jurisdictions. A "regulation" so sweepingly applied to so broad a range of situations would normally be predicated on the assumption that the practice so regulated is fundamentally and inherently evil, to be condemned in all its forms. Yet Texas has not attempted to prohibit insurance with unauthorized insurers, but, under the petitioners' argument (brief, p. 10), "regulates" such insurance by imposing a mild deterrent equally on all forms of insurance with unauthorized insurers placed otherwise than through a licensed agent. The identical 5% deterrent is imposed if the insurance is placed through a licensed agent, who is subject to Texas' control and is regulated by Texas. The tax may not be a deterrent at all, if there is a saving in cost by insuring with unauthorized insurers rather than with authorized insurers equal to or greater than the difference between the 5% tax on insurance with unauthorized insurers and the tax (a range of 1.1% to 3.85%, R. 46) on insurance with authorized insurers.

The plain fact is that the 5% premium tax cannot really be said to control or to "regulate" in any way the placing of insurance with unauthorized insurers otherwise than through licensed Texas agents. As noted above, it is basically a tax and not a regulation.

The insurance transactions sought to be taxed here regarded as a whole take place wholly outside Texas;

the only connection between Texas and the insurance transactions is the presence of the insured property in Texas; Texas at best has a minimal interest in the insurance of Todd's Texas property; the 5% premium tax bears no reasonable relation to the protection of that minimal interest. These factors individually and cumulatively render the 5% premium tax invalid as a regulation under *Osborn v. Ozlin* and *Hoopeston Canning Co. v. Cullen* as well as under *Allgeyer v. Louisiana*, *St. Louis Cotton Compress Co. v. Arkansas*, *Fidelity & Deposit Co. v. Tafoya* and *Compañía General de Tabacos de Filipinas v. Collector of Internal Revenue*.

### Conclusion

The insurance transactions over which Texas seeks to assert jurisdiction in this case take place entirely outside Texas, and the sole connection between Texas and the out-of-state insurance transactions is the physical presence of the insured property in the state. Under the decisions of this Court, the physical presence of insured property within a state does not alone give the state power to tax or to regulate the insurance of that property outside the state.

The judgment of the Texas Court of Civil Appeals should be affirmed.

Respectfully submitted,

CLOYD LAPORTE,  
JOHN MASON HARDING,  
*Attorneys for The Church Fire  
Insurance Corporation and The  
Catholic Relief Insurance Com-  
pany of America as amici curiae.*

DEWEY, BALLANTINE, BUSHBY,  
PALMER & WOOD,  
*Of Counsel.*

February 16, 1962



**EXHIBIT A****Article 21.38 of the Texas Insurance Code****Art. 21.38. Direct Insurance With Unauthorized Insurers**

**SEC. 1. Purpose of Article.**—The purpose of this article is to regulate the placing of policies or contracts, effecting direct insurance, with certain non-authorized insurers, and to subject certain unauthorized insurers to the jurisdiction of courts of this State in suits by or on behalf of insureds or beneficiaries under insurance contracts. The Legislature declares that it is the subject of concern that the placing of such direct lines of insurance with unauthorized insurers is not properly regulated, and that many residents of this State hold policies of insurance issued by insurers not authorized to do business in this State, thus presenting to such residents the often insurmountable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies. In furtherance of such State interest, the Legislature herein provides a regulation as to the placing of such direct lines of insurance in such unauthorized companies, and the method of direct service and substituted service of process upon such insurers, and declares that in so doing it exercises its powers to protect its residents, and to define for the purpose of the Statute what constitutes doing business in this State, and also exercises powers and privileges available to the State by virtue of Public Law 15, Seventy-ninth Congress of the United States, Chapter 20, First Session, S. 340, as amended, which declares that the business of insurance and every person engaged therein shall be subject to the laws of the several states.



**SEC. 2. Tax on Insurance Premiums. Policies or Insurance Contracts Placed with Unauthorized Insurers; Licensing of Agents; Affidavit of Insureds and Report of Agents**

(a) The Board of Insurance Commissioners, upon payment by the applicant of an annual license fee of Twenty-five Dollars (\$25), which fee shall be placed in the separate fund that is provided pursuant to Section 21 of Article 21.14 of the Insurance Code, may issue to an agent who is regularly commissioned to represent one (1) or more fire, fire and marine, inland, casualty or surety insurance companies, licensed to do business in this State, a Certificate of Authority to place lines of direct insurance affected hereby to be evidenced by policies of insurance or certificates of insurance in insurers not licensed to do business in this State (hereinafter sometimes referred to as unauthorized insurers). Each such license shall expire on the 31st day of the succeeding December. No diminution of the license fee herein provided shall occur as to any license effective after January 1st of any year. The Board may require written application for such license.

(b) Before receiving the license provided for in the preceding Section of this law, the party applying for same shall file with the Board a bond in the sum of Five Thousand Dollars (\$5,000) payable to the Governor, for the faithful observance of the provisions of this Article. Said bond shall be approved by the Board and be for the benefit of the State of Texas.

(c) When any policy of insurance or certificate of insurance is procured under authority of such license, there shall be executed by the insured an affidavit setting forth facts showing that such insured was unable after diligent effort to procure from any licensed company or companies the full amount of insurance required to protect the property, liability or risk de-

sired to be insured, and further showing that the amount of insurance procured from nonlicensed insurer or insurers is only the excess over the amount so procurable from licensed companies. Each such affidavit shall be filed with the Board with the tax report required in accordance with the provisions of Subdivision (d) below.

(d) The agent so licensed shall report, under oath, to the Board within thirty (30) days from the 1st day of January and July of each year the amount of gross premiums paid for such insurance placed through him in nonlicensed insurers, and shall pay to the Board a tax of five per cent (5%) thereon. The term 'gross premiums' shall mean the total gross amount of premiums received on each and every such insurance, less return premiums. The agent so licensed shall keep a separate record of all transactions as herein provided, open at all times to the inspection of the Board.

• (e) If any person, firm, association or corporation shall purchase from an insurer not licensed in the State of Texas a policy of insurance covering risks within this State in a manner other than through an insurance agent licensed as such under the laws of the State of Texas, such person, firm, association or corporation shall pay to the Board a tax of five per cent (5%) of the amount of the gross premiums paid by such insured for such insurance. Such tax shall be paid not later than thirty (30) days from the date on which such premium is paid to the unlicensed insurer.

(f) If any such policy purchased from an insurer not licensed in this State, either by purchase from such insurer or through an agent licensed hereunder, shall cover risks partially within and partially without this State, the tax levied in Subdivisions (d) and (e) above is to be measured only by that portion of the premium paid for insurance covering risks within this State.

(g) Any person, firm, association or corporation, or any receiver of such, failing to pay any tax for a period of thirty (30) days from the date when said tax is required by the foregoing Subdivision (d) or Subdivision (e) (whichever is applicable), shall forfeit and pay to the State of Texas a penalty of twenty-five per cent (25%) upon the amount of such tax and in which event the Board of Insurance Commissioners shall report the default to the Attorney General of Texas who shall prosecute a suit for and be entitled to recovery of the amount of such tax and the amount of such additional penalty, which amount both tax and penalty shall draw interest at the rate of six per cent (6%) per annum from the date such penalty accrues until fully paid.

(h) The provisions of this Act shall not apply to contracts of re-insurance made between insurance companies.

**SEC. 3. Acts Not Permitted; Permissible Acts of Agents.**—Nothing contained in this article shall authorize any person, firm, association, or corporation to guarantee or otherwise validate or secure the performance or legality of any agreement, instrument or policy of insurance of any insurer not licensed to do business in Texas, nor to permit or authorize any nonlicensed insurer to do any insurance business by or through any person or agent acting within this State; but agents licensed hereunder acting pursuant to this article may issue and deliver to their clients, the insured, binders, policies and other confirmation of direct insurance so lawfully placed, and shall not be personally liable to the holder of any policy of insurance so issued or delivered for any loss covered by same.

**SEC. 4. Suits Against Unlicensed Insurers.**—A nonlicensed insurer may be sued upon any cause of

action arising in this State under any contract issued by it as hereinabove authorized, in a court of competent jurisdiction in any county in which the plaintiff may reside, or in which the cause of action arose. Any such policy or contract shall contain a provision authorizing service of citation or other legal process upon a person or firm whose name and address shall be set out therein, which said person, or at least one (1) of the members of said firm, shall be residents of Texas. Or in lieu thereof any such policy or contract shall contain a provision authorizing service of citation or other legal process upon the Chairman of the Board of Insurance Commissioners, designating the person to whom said Chairman shall mail citation or other legal process. In the event service of legal process against a nonlicensed insurer is made by service upon the Chairman of the Board of Insurance Commissioners, he shall forthwith mail citation or other document or process required to the person designated by the nonlicensed insurer in the policy for the purpose by registered mail with return receipt requested. In the event of service of citation or other legal process upon the Chairman of the Board of Insurance Commissioners of Texas, the nonlicensed company shall have forty (40) days from date of service upon said Chairman within which to plead, answer or otherwise defend the action. Upon service of process upon the Chairman of the Board of Insurance Commissioners in accordance with this law, or upon the person or firm designated in the policy or contract in accordance with this law, the court shall be deemed to have jurisdiction in personam of the nonlicensed insurer. A nonlicensed insurer issuing such insurance policy or contract shall be deemed thereby to have authorized service of process against it in the manner and effect as provided in this article.

**SEC. 5. Application of Preceding and Succeeding Sections.**—As to any policy or contract issued pursuant

to and in compliance with all the applicable requirements of the preceding Sections of this Article, and as to any claim for loss or damage arising under any such policy or contract, the foregoing Sections of this Article shall apply, and the succeeding Sections of this Article shall not apply except to the extent provided in Section 7 of this Article. As to any such policy or contract issued by an unauthorized insurer in a manner not in compliance with all the applicable requirements of the preceding Sections of this Article, the following Sections of this Article shall apply.

**SEC. 6. Service of Process Upon Unauthorized Insurer**

(a) As to any policy or contract issued by an unauthorized insurer in a manner not in compliance with all the applicable requirements of the foregoing provisions of this Article, any of the following Acts in this State, effected by mail or otherwise, by an unauthorized foreign or alien insurer, (1) the issuance or delivery of contracts of insurance to residents of this State, or to corporations authorized to do business therein, (2) the solicitation of applications for such contracts, (3) the collection of premiums, membership fees, assessments or other considerations for such contracts, or (4) any other transaction of business, is equivalent to and shall constitute an appointment by such insurer of the Chairman of the Board of Insurance Commissioners and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process in any action, suit, or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contract of insurance, and any such act shall be signification of its agreement that such service of process is of the same legal force and validity as personal service of process in this State upon such insurer.

(b) Such service of process shall be made by delivering to and leaving with the Chairman of the Board of Insurance Commissioners, or some person in apparent charge of his office, two (2) copies thereof and the payment to him of such fees as may be prescribed by law. The Chairman of the Board of Insurance Commissioners shall forthwith mail by registered mail one (1) of the copies of such process to the defendant at its last known principal place of business, and shall keep a record of all process so served upon him. Such service of process is sufficient, provided notice of such service and a copy of the process are sent within ten (10) days thereafter by registered mail by plaintiff or plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

(c) Service of process in any such action, suit or proceeding shall in addition to the manner provided in Subsection (b) of this Section be valid if served upon any person within this State who, in this State on behalf of such insurer, is

(1) soliciting insurance, or

(2) making, issuing or delivering any contract of insurance, or

(3) collecting or receiving any premium, membership fee, assessment or other consideration for insurance; and a copy of such process is sent within ten (10)

days thereafter by registered mail by the plaintiff or plaintiff's attorney to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

(d) No plaintiff or complainant shall be entitled to a judgment by default under this Section until the expiration of thirty (30) days from date of the filing of the affidavit of compliance.

(e) Nothing in this Section contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

#### **SEC. 7. Defense of Action by Unauthorized Insurer.**

(a) As to any policy or contract issued by an unauthorized insurer in a manner not provided by Sections 1, 2, 3(a), 3(b), 3(c) and 3(d) of this Article, and as to any claim arising thereon or thereunder, before any unauthorized foreign or alien insurer shall file or cause to be filed any pleading in any action, suit or proceeding instituted against it, such unauthorized insurer shall either (1) deposit with the clerk of the court in which such action, suit or proceeding is pending, cash or securities, or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient



to secure the payment of any final judgment which may be rendered in such action; or (2) procure a certificate of authority to transact the business of insurance in this State.

(b) The court in any action, suit or proceeding, in which service is made in the manner provided in Subsections (b) or (c) of Section 6, may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of Subsection (a) of this Section and to defend such action.

(c) Nothing in Subsection (a) of this Section is to be construed to prevent an unauthorized foreign or alien insurer from filing a motion to quash a writ or to set aside service thereof made in the manner provided in Subsections (b) or (c) of Section 6 hereof on the ground either (1) that such unauthorized insurer has not done any of the acts enumerated in Subsection (a) of Section 6, or (2) that the person on whom service was made pursuant to Subsection (c) of Section 6 was not doing any of the acts therein enumerated.

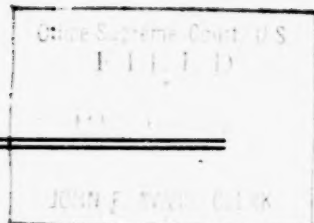


**CERTIFICATE OF SERVICE**

I, CLOYD LAPORTE, one of the attorneys for The Church Fire Insurance Corporation and The Catholic Relief Insurance Company of America as *amici curiae* herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 16th day of February, 1962, I served copies of the foregoing Brief for the said *amici curiae*, pursuant to Rule 33 of the Revised Rules of the Supreme Court, by causing copies thereof to be deposited in a United States post office or mail box, with air mail postage prepaid, addressed to counsel of record for petitioners and respondent at their respective post office addresses, Capitol Station, Austin 11, Texas, and 510 Gulf Building, Houston 2, Texas.

CLOYD LAPORTE,

*Attorney for The Church Fire  
Insurance Corporation and The  
Catholic Relief Insurance Com-  
pany of America as amici curiae.*



---

**IN THE**  
**SUPREME COURT OF THE UNITED STATES**

**October Term, 1961**

---

**No. 144**

---

**STATE BOARD OF INSURANCE, ET AL.,**

**Petitioners,**

*Versus*

**TODD SHIPYARDS CORPORATION,**

**Respondent.**

---

**On Writ of Certiorari to the Court of Civil Appeals  
of Texas, Third Supreme Judicial District,  
Sitting in Austin, Texas**

---

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND AMICUS CURIAE BRIEF OF THE  
STATE OF LOUISIANA**

**JACK P. F. GREMILLION**

*Attorney General of Louisiana*

IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1961

---

**No. 144**

---

**STATE BOARD OF INSURANCE, ET AL.,**  
**Petitioners,**

*Versus*

**TODD SHIPYARDS CORPORATION,**  
**Respondent.**

---

**On Writ of Certiorari to the Court of Civil Appeals  
of Texas, Third Supreme Judicial District,  
Sitting in Austin, Texas**

---

**MOTION OF JACK P. F. GREMILLION, ATTORNEY  
GENERAL OF THE STATE OF LOUISIANA, FOR  
LEAVE TO FILE BRIEF AS AMICUS CURIAE.**

---

Jack P. F. Gremillion, Attorney General of the State of Louisiana, respectfully moves this Court for leave to file a brief in this case as amicus curiae.

The time for filing amici briefs in support of the position of the State of Texas by consent expired during the month of January, 1962.

The applicant has an interest in this case in that the statutes of the States of Texas and Louisiana relative to the tax on unauthorized insurance not placed through a licensed agent or broker are very similar in content, and applicant has reason to believe that the argument of the State of Texas should be made complete in this Court. If the said argument is approved by this Court, the decisions of the Courts below must be reversed.

s/ JACK P. F. GREMILLION  
*Attorney General*  
State of Louisiana.

## **SUBJECT INDEX**

**Index of Authorities** .....

**Interest of the Amicus Curiae** .....

**Summary of Argument** .....

**Argument** .....

**Conclusion** .....

## INDEX OF AUTHORITIES

Cases:	Pages
<i>Alaska Packers Association v. Industrial Accident Commission of California, et al.</i> , 294 U.S. 532 (1935).....	7
<i>Allgeyer v. Louisiana</i> , 165 U.S. 528 (1896) .....	3
<i>Compania General de Tabacos de Filipinas v. Collector of Internal Revenue</i> , 275 U.S. 87 (1927) .....	4
<i>Hoopeston Canning Co., et al. v. Cullen</i> , 318 U.S. 313 (1943) .....	5
<i>Osborn v. Ozlin</i> , 310 U.S. 53 (1940) .....	4
<i>St. Louis Cotton Compress Co. v. Arkansas</i> , 260 U.S. 347 (1922) .....	3

IN THE  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1961

---

**No. 144**

---

**STATE BOARD OF INSURANCE, ET AL.,**  
**Petitioners,**

*Versus*

**TODD SHIPYARDS CORPORATION,**  
**Respondent.**

---

**On Writ of Certiorari to the Court of Civil Appeals  
of Texas, Third Supreme Judicial District,  
Sitting in Austin, Texas**

---

**BRIEF OF JACK P. F. GREMILLION, ATTORNEY  
GENERAL OF THE STATE OF LOUISIANA,  
AS AMICUS CURIAE.**

---

By leave of this Court, Jack P. F. Gremillion, Attorney General of the State of Louisiana, files this brief as amicus curiae.

**INTEREST OF AMICUS CURIAE**

The amicus curiae, Jack P. F. Gremillion, Attorney General of the State of Louisiana, has an interest in this case



in that the statutes of the States of Texas and Louisiana relative to the tax on unauthorized insurance not placed through a licensed agent or broker are very similar in content.

## SUMMARY OF ARGUMENT

As stated in the brief of the petitioners, more than the interests of the State of Texas and the respondent are involved here. The whole future of State regulation of the insurance business hangs in the balance. Some twenty-two states have provisions similar to that of Texas. For the protection of the insurance buying public on risks located within a State which has such a provision in its Insurance Code, it is only fair and proper that there be an equalization of the tax burden born by risks within such a state.

It is clear that Texas has a definable interest in the contract of insurance involved when those contracts of insurance affect risks and property and people, the general welfare of which Texas is bound to promote. A state may exercise virtually complete power in the regulation of the insurance business in order to protect the interests of its citizens. At no time does a state have within its geographical jurisdiction more elements of the insurance business than the property insured, the insured and the insurer.

Louisiana is seeking to point out all the doubts that have been cast upon the opinion in the case of *Allgeyer v. Louisiana*, 165 U.S. 528, 17 Sup. Ct. 427, 41 L. Ed. 832.

## ARGUMENT

WHETHER TEXAS IS PROHIBITED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

OF THE UNITED STATES CONSTITUTION FROM  
TAXING INSURANCE PREMIUMS PAID BY PER-  
SONS INSURING TEXAS RISKS ON INSURANCE  
POLICIES CONTRACTED FOR IN NEW YORK.

The Court of Civil Appeals below decided this case on the basis of the court's opinion in the cases *of Allgeyer v. Louisiana*, 165 U.S. 528 (1896), and *St. Louis Cotton Compress Company v. Arkansas*, 260 U.S. 347 (1922). In the *Allgeyer* case, the Court said:

"It (Atlantic Mutual Insurance Company of New York) has done no business of insurance within the State of Louisiana, and has not subjected itself to any provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the property of its citizens, even if that property were in the State of Louisiana, and correlatively the citizens of Louisiana had the right without the State of entering into contract with an insurance company for the same purpose. Any act of the State legislature which should prevent the entering into such a contract \* \* \* is an improper and illegal interference with the conduct of the citizen, although residing in Louisiana, in his right to contract and carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the State."

Nowhere in the instant case has the question of the right of an insured to place a policy with an unauthorized insurer been raised. Such a right is admitted. However, the statute involved merely imposes a tax upon the insured so placing insurance with an unauthorized insurer.

In the case of *St. Louis Cotton Compress Company v.*

*Arkansas, supra*, this Court found that a tax on premiums levied by Arkansas was just as much an interference with the liberty of contract as was the fine levied by Louisiana in the *Allgeyer* case.

Finally, in the case of *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 48 Sup. Ct. 100 (1927), this Court, in an analysis of the *Allgeyer* and *Cotton Compress Company* cases said:

"The effect of them is that, as a state is forbidden to deprive a person of his liberty without due process of law, it may not compel anyone within its jurisdiction to pay tribute to it for contracts or money paid to secure the benefit of contracts made and to be performed outside of the state."

In the *Compania General* case, Mr. Justice Holmes in his dissent (which was concurred in by Mr. Justice Brandeis), said:

"The government has the insured within its jurisdiction. **I can see no ground for denying its right to use its power to tax unless it can be shown that it has conferred no benefit of a kind that would justify the tax, as is held with regard to property outside of a State belonging to one within it.** \* \* \*

"The result of upholding the government's action is just. When it taxes domestic insurance it reasonably may endeavor not to let the foreign insurance escape. If it does not discriminate against the latter it naturally does not want to discriminate against its own." (Emphasis supplied.)

This Court again stated in the case of *Osborn v. Ozlin*, 310 U. S. 53, 60 Sup. Ct. 758 (1940), that:

**"In Allgeyer vs. Louisiana, \* \* \*, apart from the doubts that have been cast upon the opinion there, this state attempted to penalize the making of contracts by its residents outside its borders with companies which have never subjected themselves to local control." (Emphasis supplied.)**

and in *Hoopeston Canning Co., et al. v. Cullen*, 318 U. S. 313, 63 Sup. Ct. 602 (1943), stated that:

"While the wisdom of the Allgeyer case has occasionally been doubted \* \* \*. The Allgeyer and subsequent insurance cases have been recently considered in *Griffin v. McCoach*, supra, at page 506, 507, of 313 U. S., 61 S. Ct. at page 1027, 85 L. Ed. 1481, 134 A.L.R. 1462, and in *Osborn v. Ozlin*, 310 U.S. 53, 66, 60 Sup. Ct. 758, 763, 84 L. Ed. 1074; as the analysis in those opinions clearly indicates, the Allgeyer line of decisions cannot be permitted to control cases such as this, where the public policy of the state is clear, the insured interest is located in the state and there are many points of contact between the insurer and the property in the state."

Inasmuch as this Court has stated that the Allgeyer decision was a doubtful one, we submit that the doubts have firm basis and that the opinion set forth in the Allgeyer line of cases should be reversed.

In the instant case, Texas has exerted its powers as to matters within the bounds of its control. It is submitted that it is clear that Texas has a definable interest in the contracts of insurance when those contracts affect risks and property and people, the general welfare of which Texas is bound to promote. Texas has not imposed conditions upon the privilege

of the respondent to engage in local business which would bring within the area of State power matters unrelated to any local interests. It is our opinion that the matters which Texas seeks to control and tax are not beyond its legitimate interest.

This Court further stated in the *Osborn v. Ozlin* case, *supra*, that:

"In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business, just as it can operate warehouses, flour mills, and other business ventures, \* \* \* or might take 'the whole business of banking under its control,' \* \* \* . If the state, as to local risks, could thus preempt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against its local hazards. \* \* \* The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control."

In the instant case, Texas claims, as Virginia claimed in the *Osborn v. Ozlin* case, *supra*, that:

"\* \* \* her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia, and Virginia's regulation of it."

While the Texas statute which the respondent asks this Court to declare unconstitutional does technically encumber a contract made entirely outside of the geographical limits of the Texas jurisdiction, the mere fact that State action may

have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the constitution forbids. *Alaska Packers Association v. Industrial Accident Commission*, 294 U. S. 532.

## CONCLUSION

A state may exercise virtually complete power in the regulation of the insurance business in order to protect the interests of its citizens, particularly since insurance is a business affected with the public interest and a business which is regulated in the public interest. At no time does a state have within its geographical jurisdiction more elements of the insurance business affected with the public interest than (1) the property insured, (2) the person to whom the insurance is issued, or (3) the person who issues the insurance. It is submitted that the absence of any one of these elements would not materially affect the state's power to protect the interests of its citizens in the insurance business because the absence of any one of these elements would not materially affect the interest of the state's citizen or of the property insured.

Therefore, it is respectfully submitted that the case of *Allgeyer v. Louisiana*, *supra*, should be reversed and that the decision of the Court of Civil Appeals below be reversed.

Respectfully submitted,

JACK P. F. GREMILLION  
Attorney General of Louisiana

---

*Amicus Curiae*

**CERTIFICATE OF SERVICE**

A copy of this brief amicus curiae and of the motion for leave to file the same have been served pursuant to Supreme Court Rule No. 33 by depositing copies thereof in a United States Mail Box, with first class postage prepaid, addressed to counsel of record for petitioners, Capitol Station, Austin 11, Texas, and addressed to counsel of record for respondent, 510 Gulf Building, Houston 2, Texas.

---

Jack P. F. Gremillion